

No. 14049

VOL.  
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United States  
Court of Appeals  
for the Ninth Circuit

PEOPLE OF THE STATE OF CALIFORNIA,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

SANTA MARGARITA MUTUAL WATER  
COMPANY,  
Appellant,

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Transcript of Record

In Two Volumes

VOLUME II.

(Pages 441 to 895, inclusive)

Appeals from the United States District Court for the Southern  
District of California, Southern Division

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(Testimony of Allen C. Bowen.)

Q. And Exhibit 22 would show the portion of the basin which is occupied by the aircraft, would it?

A. It would.

Q. Now, isn't it a fact, Major, that during the last two years a large portion of Chappo and Ysidora basin has been changed, that is, the trees and vegetation have been removed for flood-control purposes and for the purpose of [459] conserving water?

A. There is a continuing program of phreatophyte control there on the basin.

Q. Do you believe, as Mr. Hall recommended for flood-control protection and water control, you would recommend that the foliage and vegetation growing on the basin should be removed?

A. I missed the first part of your question. Did you say someone had recommended?

Q. Yes, Mr. Hall.

A. Did you ask, had Mr. Hall recommended?

Q. I said, do you agree with him?

A. With his recommendation that phreatophyte be removed for the purpose of water conservation?

Mr. Shryock: I am not certain Mr. Hall made any such blanket recommendation as that. If you want him to pre-suppose that the recommendation was made——

Q. (By Mr. Dennis): Let's state it in a different way. In accordance with approved practices, it is the practice in San Diego County, is it not, in basins of the type of Chappo and Ysidora basin, to remove the vegetation growing on the surface

(Testimony of Allen C. Bowen.)

of the basin for the purpose of conserving water and for flood-control purposes, is it not?

A. It is the practice to remove the economically unprofitable vegetation from the surface of those basins for [460] the purpose of conserving water and for flood control.

Q. Have you any estimate as to the number of acres on which the vegetation has been removed on Ysidora basin for the purpose of conserving water and for flood-control purposes?

A. There, again, that program does not come under my supervision, so I have no basis to make an estimate on. I know it is a continuing program, though.

Q. And you know that too is a continuing program at Chappo?      A. That is correct.

Q. Is it also a continuing program in O'Neill?

A. That is right. That is the upper basin, I presume, you are referring to.

Q. Now, I believe that you testified that there is no subsurface storage on the parcel of land which was acquired for the Naval Ammunition Depot, which consists of approximately 9,147 acres of land; is that correct?

A. I believe I specified that there was no subsurface storage along the thread of the Santa Margarita River where it borders the Naval Ammunition Depot.

Q. Do you know of any subsurface storage on the Ammunition Depot site?

A. Well, a portion of the Naval Ammunition

(Testimony of Allen C. Bowen.)

Depot is comprised of that Fallbrook surface which is deeply settled granite, commonly called decomposed granite, which naturally [461] stores a small amount of water.

Q. But you made no investigation to determine whether or not there is any subsurface storage on the site occupied by the United States Naval Ammunition Depot?

A. No. The subsurface storage on that property known as the Naval Ammunition Depot at Fallbrook would be very small.

Q. I believe that the map which is known as Map 1, which you furnished in answer to the Santa Margarita Mutual Water Company's interrogatories, shows that no portion of the site acquired by the United States Naval Ammunition Depot overlies any portion of the three basins or sub-basins.

A. That is correct.

Q. Now, you do not know of any diversions, surface or subsurface diversions, from the Santa Margarita River downstream from the Railroad Canyon gauging station to the farthest downstream northerly boundary of the Ammunition Depot?

A. Yes, I know of some diversions from the head of Temecula Gorge to the boundaries of Camp Pendleton.

Q. Approximately how many?

A. I would estimate there are 16 or 17 diversions from the stream lying between Temecula Gorge and the Camp Pendleton property.

Q. Major, are those diversions from the stream

(Testimony of Allen C. Bowen.)

or [462] water which is extracted and produced by wells?

A. By and large, diversions from the stream; direct flow.

Q. Direct flow?

A. Yes.

Q. Have you made any estimate as to the amount of water which the diversions take from the stream?

A. Well, there is one big diversion on the stream which takes a very large amount of the three second-feet which is in the stream, by virtue of the stipulated agreement between the Vails and the Government. The other 15 or 16 diversions are relatively small.

Q. Who was making the large diversion?

A. The big diversion there is the Fallbrook Public Utility District.

Q. Is that the one you had in mind when you said it was a large diversion?

A. That is right.

Q. The rest are all minor diversions?

A. By and large, they are minor. After all, there isn't much irrigable land in there. We have made surveys in there, as you know, for some of your clients, and the acreage is rather limited.

Q. When you use the term "diversions," you are referring to diversions both by riparian owners and by appropriation? [463]

A. That is right, all diversions.

Q. Now, excluding the Fallbrook Public Utility



(Testimony of Allen C. Bowen.)

District, would you say all the other diversions will extract less than 100 acre-feet per year?

A. No, I would not say less than 100 acre-feet. The Fallbrook Utility District——

Q. I said exclusive of Fallbrook.

A. I understood you. Fallbrook takes out about two and one-half second feet, and this summer all the rest that was taken out by other diversions, say, half a second-foot or a second-foot, which if taken out would be one acre-foot a day through the irrigation season there, which is longer than 100 days. I would say that it was well over 100 acre-feet per year.

Q. But it would be less than 200?

A. Well, it would be somewhere between—or, I wouldn't say it would be less than 200. It would be somewhere around there, I would say.

Q. And most of that water is diverted between May and November, is it not?

A. That is right.

Q. In other words, there is very little diversion between November and May?      A. Correct.

Q. There is no occasion for diverting water except [464] for domestic use during the period mentioned, along November, December, to May?

A. You are speaking of the area between Railroad in Temecula Gorge and Camp Pendleton?

Q. Yes.

A. That is right. As a matter of fact, I think most of those people use their pumps in the winter season, and, certainly, there is no irrigation during

(Testimony of Allen C. Bowen.)

the winter or early spring. The only use is domestic.

Q. Now, attached to Exhibit 22, which I believe you testified was prepared under your supervision——

A. That is right.

Q. ——is a sheet entitled, "Sewage Effluent Discharges, Military Establishments and Installations within United States Military Reservation Boundaries, millions of gallons." Now, on the left-hand side it says, "Identity and Location," and under that we find "Camp Pendleton Plant 1," "Camp Pendleton Plant 2," "Camp Pendleton Plant 3," "Camp Pendleton Plant 4," and "Camp Pendleton-Camp Delmar 5 and 6." Can you tell me what plants those refer to, and the approximate locations? Do you have more than one sewage-disposal plant on the ranch?

A. Oh, yes. On the ranch—you mean by that Camp Pendleton? [465]

Q. Camp Pendleton.

A. Sewage-disposal plant No 1, for example, is located in grid co-ordinate 7285-B and -C.

Mr. Shryock: On what sheet of the four sheets which comprise Exhibit 22?

The Witness: On the Fallbrook sheet. Sewage-disposal plant No. 2——

Q. (By Mr. Dennis): Now, that is the plant that you referred to this morning, and placed across from the point of discharge into or just above Lake Sutro?

A. That is right. The effluent from that sewage-

(Testimony of Allen C. Bowen.)

disposal plant No. 1, located in the grid co-ordinate just given, is discharged into Lake Sutro and thence into Lake O'Neill.

Q. Now, on plant No. 2.

A. Sewage-disposal plant No. 2 is located in the 17 area. I am referring to the Oceanside sheet of Plaintiff's Exhibit No. 22, and it is located in grid co-ordinate No. 7182-N. That is sewage-disposal plant No. 2.

Q. Where is the effluent from that plant discharged?

A. The effluent from that plant is discharged back into the Santa Margarita watershed. This heavy black dash-dot line indicates the crest of the watershed as it runs through Camp Pendleton, and the sewage effluent is carried by a pipe line from the disposal plant already given on that last grid [466] co-ordinate. It follows this orange pipe line symbol, which discharges back into the Santa Margarita watershed, into this area, which has now become known as Infiltration Canyon, and it follows down the course of that canyon into the Ysidora basin.

Q. Now, plant No. 3.

A. Plant No. 3 is located in the 22 area, which is shown again on the Fallbrook sheet of Plaintiff's Exhibit No. 22, and it is located in grid co-ordinate 6583-W. That is in the lower reaches of the Chappo basin, and the sewage effluent is discharged directly into the river channel.

Q. And plant No. 4?

(Testimony of Allen C. Bowen.)

A. 4, 5, and 6 we grouped in Camp Delmar, which appears on the Oceanside sheet of Plaintiff's Exhibit No. 22, located in grid square No. 6375, in the area known as Camp Delmar.

Q. And where does that discharge? Are you through, Major?

A. The sewage effluent discharges from these three plants, 4, 5, and 6, directly into the Pacific Ocean. [467]

Q. That is the sewage effluent arising from the Naval Ammunition Depot is handled through the plant No. 1.

A. No. That has a separate plant on the Naval Ammunition Depot which is located here in Grid Co-Ordinate 7490-F Fox. That is shown on the Fallbrook sheet of Exhibit No. 22.

Q. That is the one you referred to prior——

A. I referred to that prior when it was located on your map No. 1.

Q. Are there any other sewage disposal plants in the Camp Pendleton and Santa Margarita River watershed that discharge effluent into the Santa Margarita River watershed?

A. No. Those are all the sewage treatment plants that treat water derived from the Santa Margarita River.

Q. Now I believe you testified this morning that the primary source of water for Lake O'Neill was from sewage effluent. Would you like to change your testimony in view of the fact that you since discovered that a considerable quantity of water



(Testimony of Allen C. Bowen.)

is diverted from the Santa Margarita River each year by means of the O'Neill ditch?

A. Well, I was speaking of the present at that time. No water has been diverted into Lake O'Neill from the Santa Margarita River this summer primarily because there has been no surface flow in the river. So as of right now and as of this summer the primary source of replenishment for water in Lake O'Neill is from the sewage effluent. [468]

Q. But there has been considerable water for the water year commencing in October of 1951 and terminating with 1952?

A. That is right. Last winter water was diverted.

Q. Do you know how many acre-feet were diverted during last winter?

A. I do not have those records with me. I don't know. I might say that water diverted from that structure on the Santa Margarita River may go into the O'Neill ditch and by-pass Lake O'Neill.

The ditch is so constructed that water which flows through it does not necessarily have to go into the lake. Some of it may by-pass and be discharged into the Upper Basin for recharge of the ground water supply.

Q. Have you maintained——

A. But those records, I might say, being taken at the head of O'Neill ditch doesn't necessarily reflect all of the water or indicate the amount of water, I mean to say, that goes into the Lake O'Neill.

(Testimony of Allen C. Bowen.)

Q. Have you maintained records to show what percentage of the water that is diverted by means of O'Neill ditch goes directly into Lake O'Neill and what percentage is diverted into the basin?

A. I have no such record.

Q. Are there any records on the camp?

A. Not to my knowledge. [469]

Q. That you know of?

A. Not to my knowledge, Mr. Dennis, no, sir.

Q. Do you know when they first started to allow any of the water that was diverted by O'Neill ditch to be diverted to the basin and not pass through Lake O'Neill?

A. Well, I understand that that was the custom of the ranch, the old management of Rancho Santa Margarita Y Las Flores that they customarily ran the surface flow through O'Neill ditch and either diverted it into the lake, if it was low, or by-passed the lake and allowed the water to go into the underground basin if there was sufficient water in the lake.

Q. Well, at any time that water was flowing through O'Neill ditch water would be flowing down the main channel of the Santa Margarita River through O'Neill Basin and Chappo Basin, would it not?

A. My information is that — the information that has been conveyed to me is that the entire flow during the season commonly called the irrigation season was diverted into O'Neill ditch. Now, I

(Testimony of Allen C. Bowen.)

don't know whether water was allowed to by-pass the O'Neill diversion or not.

Q. Well, now, do I understand you to say that the water was only diverted by means of the dam at the mouth of O'Neill ditch during the dry season and no diversions were being made during the wet season?

A. Well, I presume that diversions were made during [470] the flood season, yes, because that is when they would have enough water to replenish the lake.

Q. Then during the dry season the water that was diverted from the main stream by O'Neill ditch was used to supplement the supply in the basin during the wet season—the water was diverted for the means of filling O'Neill Lake or Lake O'Neill?

A. That is my understanding of the operation of that reservoir.

Q. But necessarily it had to be a surface flow in the river—there had to be a surface flow in the river at any time that you could divert water by O'Neill ditch.

A. If there was no surface flow in the river, as has been the case this past summer, why, naturally, you can't divert—where you have zero water you have zero diversion.

Q. All diversion by O'Neill ditch would be from surface flow?      A. Of necessity.

Q. Now are you familiar with the wells that had salt water intrusion?

(Testimony of Allen C. Bowen.)

The Court: He has not testified to that.

Mr. Dennis: I was just wondering if he knew what wells suffered by intrusion.

The Witness: Well, I have been informed of the wells [471] that have suffered from salt water intrusion. I think Mr. Worts got those into the record.

Q. You know of no other wells that suffered salt water intrusion?

A. No. To my knowledge the testimony given by Mr. Worts that the wells had been salted—those that had been salted reveals all that suffered from increased salinity.

Q. Now have you made any breakdown to determine what percentage or how many acres of Class I land lay within the watershed of DeLuz Creek?

A. I don't believe that Exhibit 23 shows any Class I land in DeLuz Creek. If it shows any it certainly is a very small amount.

I see down here at the confluence of the DeLuz Creek and Santa Margarita River a very small area of Class I land is shown. That is actually a terrace formation there, level land which lies above the stream channel.

Q. Are any of the lands which overlie the surface of Chappo or Middle Basin being cultivated or irrigated today?

A. There is no cultivation or irrigation of those lands at the present time.

Q. Is there any cultivation or irrigation of any



(Testimony of Allen C. Bowen.)

of the lands overlying O'Neill or Upper Basin?

A. With the exception of a nursery at the hospital there and of course the lawns around the hospital there is [472] no cultivation or irrigation.

Mr. Dennis: I think that is all.

The Court: Any redirect?

Mr. Shryock: Yes, a few questions.

### Redirect Examination

Q. (By Mr. Shryock): Major, Mr. Dennis questioned you in some detail as to Plaintiff's Exhibits 26 and 27 and I believe that the burden of your answer was to the effect that those two exhibits do in fact show the amount of water used in and out of its watershed at Camp Pendleton, is that correct? A. That is correct.

Q. And I believe you stated that they represent the water which is pumped from the underground basin? A. That is correct.

Q. Do the figures in those exhibits include any part of the duty of water of one acre-foot per acre for the 4,000-odd acres as to which you testified earlier as being covered with vegetation on the alluvial plain?

A. No. The figures given in the tables shown in Plaintiff's Exhibits 26 and 27 do not include any of that.

Q. Is it fair to say that they refer to pumped water?

A. They refer only to pumped water, that is right.

(Testimony of Allen C. Bowen.)

Q. Do you care to change your testimony as to whether or not however, this one acre-foot per acre duty of water [473] constitutes an actual use by the vegetation?

A. No, I don't wish to make any change in my testimony there. That one acre-foot per acre is a use over and above the rainfall which falls on the area and subsequently is a demand upon the ground water.

Q. Now I believe you also testified that there are some sheep, a considerable number of sheep browsing within the alluvial plain or in the valley, is that correct?

A. That is correct.

Q. What do those sheep browse on, Major?

A. Those sheep are grazing on the forage which grows on the surface of the alluvium, the surface of the underground basin. If it were not for the fact that those basins are water-bearing and make water available to plants growing on the surface throughout the summer season there would be little or no summer and fall range such as we are now harvesting.

Q. Is that vegetation economically undesirable or desirable?

A. It is economically desirable from the standpoint of agricultural economy. If that is to be considered as a cattle ranch that is the only source of range or grazing during the summer and fall season because the surrounding hill country produces a quick growing annual which matures early

(Testimony of Allen C. Bowen.)

and dies early and only gives you winter and spring range. [474]

Q. Now, I believe you stated that there is in effect a continuing plan of some sort for the removal of phreatophytes and other undesirable vegetation in the alluvial basin, is that correct?

A. That is correct. There is a continuing program for the removal of undesirable phreatophytes.

Q. Would that include removal of vegetation such as that growing where the sheep are grazed?

A. No. They are scattered—they are scattered stands of undesirable vegetation where the sheep are grazing but the area that they are grazing on are desirable forage areas, covered with desirable forage plants.

Q. The sheep don't graze on phreatophytes such as pussywillows and cat-tails and things of that nature, do they?

A. Not unless they are very hungry.

Q. Major, does the Soil Conservation Service classify areas of the nation and the world as to their climate, the prevailing climate?

A. Well, the Soil Conservation Service of the United States Department of Agriculture follows the general subdivision of climates that are accepted on a world-wide basis.

Q. Is the area in which the Santa Margarita River Watershed classified? A. Yes, it is.

Q. What is its classification?

A. It is classified as semi-arid.

Q. Now, Major, reference has been made to the

(Testimony of Allen C. Bowen.)

interrogatories which were submitted to the plaintiff and I believe you stated that you were in general charge of the preparation of answers to those various interrogatories.

Generally speaking, can you tell us the length of time which you were required to use to prepare those answers?

A. We were generally given about 10 days or two weeks in which to prepare the tables, maps and other data that were requested by the defendant.

Q. How many months before the final evolution of the pretrial order and exhibits were those answers to interrogatories prepared?

A. We had a series of interrogatories posed to us, the earliest of which were answered in January. The answers were filed, I believe, 7 January 1952. The Santa Margarita Mutual Water Company received the answers to their interrogatories, I believe, the 27th of June, 1952. That is a matter of record. I am not absolutely certain of that date.

Q. Now just by way of illustration let us take at random some of the exhibits mentioned in the pretrial order. For example, since it is within your own personal knowledge, the land classification map, Exhibit 23, and the land [476] utilization map, Exhibit 24, what length of time went into the preparation of those exhibits, Major?

A. Well, those exhibits, of course, were based upon field surveys which consumed a great many man-months of time.



(Testimony of Allen C. Bowen.)

The field work and the office work that went into the production of these exhibits here numbered 23 and 24 was very great.

Q. Now I believe you have stated that in the preparation of Exhibits such as 39, 40 and 41 you were obliged to rely on records maintained at Camp Pendleton and I believe you gave as an illustration records maintained by the Public Works Office, for example, and by the Post Supply Office?

A. Post Maintenance Office I mentioned.

Q. Post Maintenance?

A. Post Supply Office doesn't keep any of those records.

Q. So far as you know, Major, are they records maintained in the regular course of the business of those offices?

A. That is correct. Those records have been maintained by those offices over a period of years.

Q. Year after year? A. Yes.

Q. Your answer was yes? [477] A. Yes.

Q. And returning to the sewage effluent plants at Camp Del Mar. Are those plants at any distance from the Ysidora Basin itself?

A. Yes, they are a considerable distance. They are considerably removed from the Ysidora basin. I would say about two or two and a half miles as an estimate.

Q. Is there any existing pipe system at the present time through which that sewage effluent could be returned to the basin?

A. There is none.

(Testimony of Allen C. Bowen.)

Q. Would it involve, and I don't expect you to give any detailed figures, any considerable expense to construct such a system?

A. It would involve a very considerable expenditure.

Mr. Shryock: That is all, I believe, your Honor.

Mr. Dennis: If your Honor please, I neglected to ask Major Bowen two questions and I would like to ask them at this time.

The Court: All right.

#### Recross Examination

Q. (By Mr. Dennis): And that is table No. 1 in reply to the written interrogatory of the Santa Margarita Mutual Water Company, there is disclosed a number of acres in the watershed of [478] DeLuz Creek within the exterior boundaries of Camp Pendleton and I would like to ask the Major if that figure is substantially correct.

A. That figure is substantially correct, 6,869.6 acres in the DeLuz Creek watershed lying within Camp Pendleton.

Q. And would your testimony as to Fallbrook Creek be the same?

A. Yes, my testimony in regard to Fallbrook Creek would be the same. The acreage we show in the watershed of Fallbrook Creek lying within the Naval Reservation is 3,798.9 acres.

Mr. Dennis: That is all.

The Court: All right, sir.

Mr. Shryock: All right, Major, thank you. I ne-

glected to ask Mr. Grover if he had any cross examination but I thought Mr. Dennis asked him.

Mr. Grover: I think it may be understood, your Honor, if I have any questions I will speak up.

The Court: All right, we will take a short recess, gentlemen.

(Short recess.) [479]

The Court: Call your next witness.

Mr. Shryock: The United States calls Mr. Henderson to the witness stand.

### PAUL F. HENDERSON

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

#### Direct Examination

The Clerk: What is your name, please?

The Witness: Paul F. Henderson, 704 North Cambridge, Portland, Oregon. \* \* \* \* \* [480]

Mr. Shryock: That brings us to the point, your Honor, at which I am going to attempt to establish Mr. Henderson's relationship with Camp Pendleton and the Santa Margarita Valley and I shall proceed with that if that is agreeable to your Honor.

The Court: All right, proceed.

Q. (By Mr. Shryock): Now, Mr. Henderson, will you describe to the court the circumstances under which you became associated with any studies at Camp Pendleton and with the Santa Margarita River Valley portion of Camp Pendleton.

A. About the first week of January 1951 at 7:30 in the evening, I received a call from Washington,

(Testimony of Paul F. Henderson.)

D.C. asking me if I would accept the responsibility of making a hydrological study of the water supply on the Santa Margarita River.

As a result of that call I made a trip to Washington and was given the details of the hydrological studies and told what they wanted me to do.

As a result of that meeting in Washington a memorandum of agreement was prepared between the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, [505] and the chief of the Bureau of Yards and Docks of the Navy, for me to undertake the studies in the Santa Margarita River valley.

Q. Is the Bureau of Yards and Docks a division of the Navy?           A. That is correct.

Q. All right, sir.

A. Immediately upon return to Portland I proceeded to Camp Pendleton and started setting up the office that is now known as the Office of Ground Water Resources.

Q. Now, you continued to retain your identity with the Department of Interior, is that correct?

A. That is correct. I am down here only on a loan basis.

Q. And that was a reimbursable basis between two Government departments?

A. That is correct.

Q. Well now, will you proceed?

A. When I arrived at Camp Pendleton——

Q. Were you on a full-time job status?

A. No, I was not. It was only such times as I



(Testimony of Paul F. Henderson.)

could afford to be down here from my existing assignment with the Bureau of Indian Affairs.

Q. Did you remain in a civilian capacity?

A. I did. [506]

Q. And will you describe the work which you then undertook after your arrival at Camp Pendleton?

The Court: Tell us further was that status changed where they gave you full time down here?

The Witness: I have never been down here full time. It was just as I could come down from my assignment in Portland.

The Court: All right, go ahead.

The Witness: I immediately proceeded to become acquainted with the watershed of the Santa Margarita River. I utilized jeeps. I utilized the automobile and to a great extent the so-called flying windmill.

In that way I was able to become very familiar with the entire watershed. I spent approximately four weeks the first time I was down here in going over and acquainting myself with the main physical features of the watershed. And at various times during the last or, since that time, I have made such trips as I thought were necessary to acquaint myself with certain details in connection with that work.

Q. (By Mr. Shryock): Now upon your arrival were you given any title?

A. I was given the title of civilian in charge of the office of ground water resources.

(Testimony of Paul F. Henderson.)

Q. Was that office organized and operating when you arrived? A. It was not. [507]

Q. And what did you have to do with the creation of that organization?

A. First I met with the post supply officer to find a place to open the office. He gave us the present location. It was then necessary to spend considerable time getting office furniture, office supplies, office equipment and to secure the proper personnel to start the investigation work in connection with all of the studies that I was to make.

Q. And did you remain in charge of the organizing work of that office?

A. I did for approximately six months, upon which—at which time I requested to be relieved of the responsibility of the personnel and administrative activities and to confine my work entirely to the engineering studies involved in the hydrological work.

The Court: By that time you had gotten all these men who testified here?

The Witness: Some of them, yes, sir. There has been quite a few changes in personnel.

Q. (By Mr. Shryock): At the time then you were so relieved of administrative duties. Did you have a functioning organization at that time?

A. I did, yes.

Q. Do you recall roughly how many personnel were employed then in the office? [508]

A. It would be a very rough guess—18 to 20.

Q. Major Bowen has testified——

(Testimony of Paul F. Henderson.)

A. I left—when I was relieved of the administrative and personnel duties Walt Turnbull, a civilian, took over.

The Court: In your personnel did you have military people?

The Witness: I had both military and civilian personnel.

The Court: All right.

Q. (By Mr. Shryock): Is the organization of the office as it exists today substantially as you left it?

A. Substantially, yes. It has been expanded somewhat.

Q. Now, in your work as a water engineer will you discuss the extent to which you are required to rely, or do you rely upon records of the United States Geological Survey?

A. In most cases the records of the United States Geological Survey as posted in their water supply papers provide the only records available.

Q. Could you discuss the accuracy and prestige of those records in your profession?

A. The studies as undertaken by the U.S. Geological Survey and reflected in their water supply papers are for the most part extremely accurate. If they have any question in regard to the accuracy they so state in their introductory data.

It has been my experience that those papers provide an excellent basis for water supply studies.

Q. And what generally is their degree of acceptance in the profession of water engineering?

(Testimony of Paul F. Henderson.)

A. I have known of no case where their data was not accepted.

Q. Have you to any extent relied upon those records in your studies made on the Santa Margarita River?

A. I have. The records on the Santa Margarita are the best, most complete set of records I have been able to obtain in any of my water supply studies.

Q. And have you done similarly in other water supply projects in other parts of the country?

A. I have, yes. I have used those for the last 30 years.

Q. Mr. Henderson, I show you a series of sheets purporting to cover water years from the year 1924-25 to the water year 1951-52 and I ask you to describe briefly what the nature of this document is.

A. This document is prepared directly under my supervision. Actually I did considerable of the plotting on these graphs myself. And in setting these graphs up I first determined the maximum amount of water which I could expect to use during the various years.

I have always set up on the graphs certain demands by Camp Pendleton and the Vail interests.

Q. And what was the source of the data? [510]

A. The original source of the data for the run-off curve was from the U.S.G.S. water supply papers—records. Also from the diversion records of the Camp Pendleton and the Vail properties.



(Testimony of Paul F. Henderson.)

Q. And has that involved your personal investigation and inspection of those records?

A. That has very definitely.

Mr. Shryock: If the court please, I should like to offer into evidence as Plaintiff's Exhibit No. 42, I believe, the document which the witness has just described.

The Court: Because I do not want to take up the time to read the paper, I wish you would tell me in a few words what that shows. That has been done with reference to other documents.

Mr. Shryock: If the court please, we propose to examine Mr. Henderson in considerable detail on this document.

The Court: All right.

The Clerk: Is this admitted?

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit 42 and received in evidence.)

Q. (By Mr. Shryock): Now, Mr. Henderson, will you proceed with an analysis of that document but, I believe first in answer to his Honor's question, will you state generally what the nature of it is and what it purports to demonstrate? [511]

A. In starting a water supply study the first thing you must determine is the amount of water which can be expected to be available over a period of years from the stream upon which your development is to occur.

Necessarily, we can't tell what we can expect in the future so we must study the past records with

(Testimony of Paul F. Henderson.)

the assumption that the same cycles or same relationships will occur in the future as have occurred in the past.

The Court: Over a period of years?

The Witness: Yes, over a period of years—as many years as we can obtain accurate records of.

Q. (By Mr. Shryock): All right. And what form then is the exhibit presented? Is it, first of all, on a given sheet what is represented?

A. Each sheet of the graph is one water year as used by the U.S.G.S. in their studies, namely, from October 1st through September.

Q. And how many years are covered as you described it?

A. I have covered from October 1924 to June of 1952. Of course the last year—these are taken from unpublished or unchecked records and are not from the water supply papers.

Q. And the standard water year in water practice of the United States is October 1 through September 30th, is that correct?

A. That is correct. [512]

Q. So that the last year is not entirely complete? A. That is correct.

Q. Now, do those sheets purport to show the same type of information for each water year?

A. They do.

Q. Then starting with your first sheet will you describe the nature of the information which is graphed on the sheet?

A. In attempting to determine the water sup-

(Testimony of Paul F. Henderson.)

ply that would be available for a development of the Camp Pendleton area, I took the run-off records as shown in the U.S.G.S. water supply records for the Ysidora gauging station. To that I added the measured diversions from the Santa Margarita and Temecula River. In this way I determined the amount of water which could be expected to be available for irrigation and any development which might be expected on the river.

Now in following this procedure of course there are hundreds of the so-called tea cup or teaspoon water users which do form a demand upon the stream but in setting up the water supply amounts as we might be able to use for additional development, I have not made any attempt to determine the demand which these hundreds of small water users have made in the past on the stream for the reason that these people will continue to form approximately the same draft on that stream. It would be almost an impossible task [513] to determine the amount of water that has been diverted from the various small streams and the wells that these people have used.

Q. Now to be a little more specific as to the items which are actually charted or graphed on these sheets, will you describe each of the three different lines or the four different lines which are illustrated?

A. On the water supply portion of the graph I have plotted—we will take the first year which is March 1924-25 water year, which would actually

(Testimony of Paul F. Henderson.)

be March of 1925, and on the vertical line indicated by the word "March", I have plotted the exact points showing the amount of water which would be available in that month as I have just described. I have done the same with each of the other months.

Now we could have circled that point for ready reference or for location on the graph but instead I just joined these various points by a line for ready identification and for the purpose of showing the trend as to whether it was increase or decreasing in flow. So that the chart—the sheet shows monthly figures.

Q. The sheet shows monthly figures?

A. That is correct, in acre-feet. For instance in the first water year, 1924-1925, the month of October, the flow was approximately 900 acre-feet.

For November the flow was approximately 600 feet. [514]

For December it was 700 feet.

For January it was 600 feet.

For February it was 1100 feet.

And for March it was about 1200 feet.

Then it drops down in April to about 1100 feet and so on throughout the year.

Q. Now, when you say flow are you referring to a particular point?

A. I am referring to the amount of water which we could expect the Santa Margarita River to provide for development in the manner which I have just explained, namely, that I used the actual flow at the Ysidora gauging station and added to it the



(Testimony of Paul F. Henderson.)

measured diversions from the Camp Pendleton and Vail areas.

The Court: Mr. Henderson, I don't think anyone has put in the record a proper definition of an acre-foot. Would you put that in the record?

The Witness: An acre-foot is that amount of water which would cover one acre one foot deep. The amount is 43,560 cubic feet.

The Court: My recollection was nobody had put that into the record. We assumed it from the briefs and other documents, but nobody put it in the record.

Mr. Dennis: I wonder if you could reduce that to gallons? [515]

The Witness: Take 43,560 and multiply it by  $7\frac{1}{2}$ .

Mr. Dennis: Approximately 326,000 gallons?

The Witness: (No answer.)

Q. (By Mr. Shryock): Also at this point, Mr. Henderson, could you state that when the term "cubic feet per second" or "second-feet," when either of those terms is used can you relate that back to acre-feet per year?

A. A cubic foot per second is a cubic foot each second. That amounts to a flow of two acre-feet in a 24-hour period. The acre-foot is volume and your second-foot is rate. [516]

Q. And that is the flow past a given point?

A. That is correct.

Q. So that a cubic foot per second, or a second-foot—and those are synonymous terms——

(Testimony of Paul F. Henderson.)

A. They are entirely synonymous.

Q. ———would result if it were a constant in some 724 acre-feet per year? Is that approximately correct?

A. Now, let me get your question again. A cubic foot per second——

Q. Let us say that is the yield of a given water source, a cubic foot.

A. A cubic foot per second—with 365 days in a year, a cubic foot per second would flow 2 acre-feet in a day, so it would be 2 times 365.

Q. Which is 730?

A. Would be 730 acre-feet in the year's time.

Mr. Dennis: That is approximate?

The Witness: That is an approximation. The actual figure, instead of being 2, is 1.98 and about four other figures after it. Common usage in every case, as far as I know, has been accepted as 2 acre-feet.

Q. (By Mr. Shryock): Per 24-hour period?

A. For the 24-hour period.

Q. Now, returning again to Plaintiff's Exhibit 42, what is the lowest line at the bottom of the sheet? [517]

A. The lowest line at the bottom of the sheet was established as a historical use or diversion for the Ysidora Mesa or what has been termed as Stuart Mesa in these proceedings. It has been referred to by previous witnesses as the Stuart Mesa. That is those lands lying outside of the watershed

(Testimony of Paul F. Henderson.)

that are being irrigated from pumping in the Ysidora Basin.

Q. Now, what about the line immediately above that?

A. The line immediately above that is the water supply graph, as I have just indicated. The line above that marked "Total Camp Pendleton," is the amount of water which Camp Pendleton would be entitled to divert from the stream for agricultural purposes, broken down on a monthly basis for military use instead of agricultural use, the basis of the total diversion being the acreage which Maj. Bowen stated was riparian to the stream, and the amount of water which that acreage would be entitled to receive if the water supply was available.

Q. In other words, that line marked "Total Camp Pendleton" does not purport to represent water which was actually there in those months, does it?

A. That represents the water which the riparian lands on Camp Pendleton could use if the water was available.

The Court: That includes lands which have been put to agricultural use in the past and those which it has been [518] testified to could be used for that purpose?

The Witness: That is correct, your Honor, in addition to the military use.

The Court: In other words, you assay the needs of Camp Pendleton, assuming that the Army were

(Testimony of Paul F. Henderson.)

in the business of agriculture, that it could legitimately use as a riparian?

The Witness: That is correct.

The Court: Is this a good stopping point?

The Witness: I have one more line, your Honor.

The Court: Go ahead. You have one more line. I thought you were through. I thought you had finished. Go ahead and finish.

The Witness: The upper demand line, marked "Total Camp Pendleton and Vail-Temecula" I have plotted on the basis of the riparian acreage on the Vail property riparian to the Temecula River. That again is based upon the acreages as testified to by Mr. Hall, plus the water use that would be required for their lands if the water supply was available.

The upper line then is the total demand on the stream if the water was available for the irrigation of the Ysidora Mesa or Stuart Mesa, the total Camp Pendleton demand, and the total irrigation demand for the Vail property riparian to the Temecula.

Now, I have made no attempt to determine the data or amount of water required by the other riparian users for the [519] reason that we did have the acreages accurately, nor did we have our studies—the studies taken to the point where we could state the number of acre-feet to be used on those lands. I have merely used the figures that we were reasonably sure of and have not attempted to



(Testimony of Paul F. Henderson.)

take the entire riparian acreage of the river itself.

Mr. Shryock: All right, sir.

The Court: All right.

Mr. Shryock: Thank you very much.

The Court: I want counsel to know and I want to say to these witnesses that if at any time either court or counsel think a stopping point has been reached and a witness thinks otherwise, do not hesitate to say so. I do not want to break the continuity. I thought, frankly, you had covered all of it.

The Witness: No, I apologize. I just wanted to bring that out.

The Court: Yes, we do not want to break the continuity. I did not look at the clock this morning, and it was 12:20 before we adjourned. I always wait for a good stopping point, and sometimes I do not know when a good stopping point is reached. You notice I always turn to counsel, and I don't mind if we go on for another five minutes or so, because it makes very little difference.

Mr. Dennis: Your Honor please, I want to say that I [520] noticed the first day of the record shows that sometimes there was a Kauba Ranch referred to. I think it should be corrected to state that in those instances we are talking about the Pauba Ranch.

Mr. Shryock: Pauba, yes.

The Court: Yes. I notice that when these gentlemen talk about these geographical places they very kindly spell them out, because we are not acquainted with the geography and, certainly, the

(Testimony of Paul F. Henderson.)

reporters are not acquainted with the geography of the Northwest. These men jump from Missouri to Klickitat, Washington, and you know you would have to have a Hammond's Atlas to follow them, and some of these places probably are not in the Atlas.

Mr. Shryock: We have tried to anticipate that, sir.

The Court: Yes. All right, gentlemen, 10 o'clock.

(Whereupon, at 4:40 o'clock p.m., Wednesday, November 5, 1952, an adjournment was taken until 10:00 o'clock a.m., Thursday, November 6, 1952.) [521]

November 6, 1952, 10:00 o'clock a.m.

The Court: I am sorry gentlemen, but I was delayed. I found a writ of habeas corpus on my desk, which I had to work on before I got on the bench. We will proceed in the case.

#### PAUL F. HENDERSON

resumed the stand as a witness for the plaintiff and, having been previously duly sworn, testified further as follows:

#### Direct Examination—(Continued)

The Clerk: This is Mr. Paul F. Henderson.

Q. (By Mr. Shryock): Mr. Henderson, at the conclusion of the proceedings yesterday, I believe you were in the midst of explaining Plaintiff's Exhibit 42. Would you now proceed to add any fur-

(Testimony of Paul F. Henderson.)

ther comments you would like to make in regard to what that exhibit purports to show?

A. There are one or two points which I might clarify in connection with Exhibit 42, and that is in connection with the reconstructed stream flow, in that the measured diversions include both pumping and surface diversions.

In my opinion, any subterranean basin, such as the Camp Pendleton basin, as well defined as it is, provides a very definite part of the stream, an integral part of the water supply. I therefore used pumping records as well as surface [524] diversions.

In regard to the demand for the Ysidora Mesa, or Stuart Mesa, I used the word "historical" diversions. By that I intended solely to point out that no additional demands were intended in connection with water diversions for that area.

These demands are shown in the graphs back as far as 1924 and were not intended as the diversions in those years.

With that I would like the report to show briefly what each of these pages indicates.

Taking, for instance, in the first year, 1924-1925, the month of June shows that the reconstructed stream flow was approximately 1,000 acre-feet, which is about one-seventh of the demand, the total demand for the Camp Pendleton area, or approximately one-sixteenth of the total demand for Camp Pendleton and the Vail properties riparian to the Temecula.

(Testimony of Paul F. Henderson.)

Referring briefly to water-supply year 1925-26, there was a fairly large flow occurring during the month of April, the reconstructed flow being approximately 14,500 acre-feet. However, that flow would not supply the riparian demand if all lands were under full development.

The next year, 1925-1927, was one of the very heavy run-off years. The flood occurred in February.

Q. You mean 1926-27?

A. 1926-27. I am sorry.

The flood occurred in February, the total reconstructed [525] flow being 81,700 acre-feet. In that month undoubtedly all riparian demand under full development might have occurred. [526]

The years '27-'28, '28-'29, '29-'30, '30-'31 are all what might be termed minimum flow years with the average monthly flows in the river varying between 1,000 and 2,500 acre-feet per month.

The flows in 1931-'32—in the month of February a small flood occurred with the reconstructed flow amounting to 31,680 feet.

The year '32-'33, '33-'34, '34-'35 were again low run-off years.

The year '35-'36—there was a small flood which occurred in February but the reconstructed run-off for that year would be approximately 7,500 acre-feet which would not supply the full demand for Camp Pendleton and the Vail area riparian to Temecula branch.

One of the largest run-off years occurred '36-'37



(Testimony of Paul F. Henderson.)

with a reconstructed flow of 56,030 acre-feet in February and 36,000 acre-feet in March. And undoubtedly these two months would have supplied full riparian demand.

This was followed by one of the largest single month run-offs which occurred during the water supply year of '37-'38, in March, with a recorded or reconstructed flow of 106,400 acre-feet.

The year '38-'39 had a comparatively low flood flow in February and similar in 1939-'40.

The year '40-'41 was another year of heavy flood flows which [527] showed a reconstructed flow of 53,570 acre-feet in March, 37,750 acre-feet in April.

We then entered the recent—no, I am sorry. The year of '41 and '42 was a low flow and we had another full water supply year in '42-'43 with floods occurring in the month of January, fairly heavy flow in February and another heavy flow in March.

We then entered the more or less drought period which got progressively worse with average flows during the year running from 1,000 to 1,500 acre-feet.

Now, the sole purpose of this graph as I have prepared it, is to show a comparison between the tremendous demand under full riparian development of all land within the watershed as compared to the very meager water supply which is available during most of the years of the period on record.

Q. When you gave as an illustration a couple of high run-off months in which you said that it undoubtedly would be adequate for the riparian de-

(Testimony of Paul F. Henderson.)

mands, were you speaking of the full prospective demand of all of the lands?

A. I was, yes, for that one month. Probably upon a full determination of all riparian lands within the watershed and the water demand for those lands there might have been sufficient water in the river in that one month to supply such a demand.

The Court: That was the heavy rainfall month in 1937 and [528] 1938?

The Witness: Yes, sir.

The Court: Wasn't that the year when we had floods all over Southern California. Those were heavy rainfall years, when we had floods in California and half of Imperial Valley was under water and half of Riverside County and Palm Springs was isolated. I remember it because I have a place there.

The Witness: That was definitely a high run-off year.

The Court: All the roads were washed out and everything else.

Q. (By Mr. Shryock): Now, Mr. Henderson, this study covers a period of some 28 years, is that correct?

A. In making this study I started with the water year 1924-25 for the reason that in my opinion that was the time when we began to have good records on the water supply of the Santa Margarita River and upon the diversions.

Q. Well, during that period of some 28-odd

(Testimony of Paul P. Henderson.)

years how many months did you find in which the run-off, in your opinion, would have been adequate for the riparian demands?

A. I didn't make an accurate check of that but it would be only 10 or 11 months in the entire period in which the reconstructed run-off in the Santa Margarita River would supply the full demand for riparian usage.

Q. All right. Now, Mr. Henderson, did you make any other studies of the stream from a different viewpoint? [529]

A. Yes, I did. My first requirement or my requirement when I reported to the Navy for this study was to determine what the safe yield at Camp Pendleton might be and in arriving at that figure I made a complete study of the entire watershed, checked the developments that have occurred over the last few years by using aerial photographs and making actual field recognizance.

After making that study and checking with the probable water supply that would be available it was my opinion that the safe annual water supply at Camp Pendleton from the Santa Margarita River, with full usage of the subterranean basin, is 12,500 acre-feet annually. [530]

Q. Now, did the construction of a dam figure in that conclusion?

A. Yes. I figured the construction of a small equalizing reservoir at the De Luz site. The purpose of that reservoir would not be primarily for storage, but would rather be installed merely to

(Testimony of Paul P. Henderson.)

spread the flood flows out for such a period of time as the water could be introduced into the subterranean basin underlying the Camp Pendleton area.

As shown by the graphs in Plaintiff's Exhibit 42, the flood flows in the Santa Margarita are very heavy for a very short period of time, which, if not controlled to some extent, would rush across the basin into the ocean, allowing very little time for passage into the underground basin.

Q. So that the dam that you projected in your computation was essentially a control structure; is that true?

A. That is all, what we term often an equalizing reservoir to spread out the flow for a sufficient period of time to introduce the water into the subterranean basin.

Q. Would that still permit any excess waters to flow across the surface plain?

A. During periods of extreme flood there would be considerable spill from that equalizing reservoir, allowing the water to spread out over the basins, over the pumping area.

Q. As a water engineer, can you say as to whether that [531] surface flow in those high runoff periods would have any particular benefit?

A. It would be very beneficial, yes.

Q. Now, what capacity in acre-feet had you figured in this structure?

A. I haven't made an exact calculation as to the capacity of the reservoir. However, it would not



(Testimony of Paul F. Henderson.)

have to exceed 50,000 acre-feet, but might be as low as 40,000 under an actual detailed study.

Q. In other words, a structure of what we might call unlimited capacity would not be a sound engineering project on a river of this kind?

A. In my opinion, it would not.

Q. Now, Mr. Henderson, so that the record may be very clear, there is not now and has not been up until now any structure of the type you describe within the limits of Camp Pendleton?

A. That is correct.

Q. And the only dam structure on the stream is the so-called Vail Dam at the present time?

A. That is correct.

The Court: You propose to take the water for storing from the river?

The Witness: That is right, yes.

The Court: And from the water allocated to the riparian [532] owners?

The Witness: That would be right, merely to hold enough to get it introduced into the subterranean basin by low flows rather than by extremely high flows, which would pass over and be wasted into the ocean.

The Court: That is right. It is not proposed to do season storing?

The Witness: That is right.

Q. (By Mr. Shryock): Mr. Henderson, are you familiar with the stipulated judgment which was entered into between the Vail interests and the Ranch? A. I am, yes.

(Testimony of Paul P. Henderson.)

Q. Are you familiar with the minimum guaranty of water which that assures? A. I am, yes.

Q. What is that quantity?

A. That minimum quantity is three second-feet at the Temecula Gorge, which flowing for 24 hours would amount to six acre-feet per day.

Q. And is that the same as three second-feet?

A. Yes, that is.

Q. What would be the situation in Camp Pendleton if it were not for that three second-feet being there under the conditions which you ascertained as having actually occurred, as reflected in Exhibit 42? [533]

The Witness: Will you repeat that, please?

(The question was read.)

A. If it had not been for the requirements for the minimum flow at the Temecula Gorge, as set up under the stipulated judgment, there would have been very little, if any, water reach Camp Pendleton during any of the summer seasons, with the exception of the heavy flood flows.

Q. (By Mr. Shryock): Is there anything you would care to add, Mr. Henderson, regarding your studies as to the water supply yielded by this river system?

A. There is one point, as brought out by Mr. Worts in his testimony, that is, the necessity, to prevent damage to the basin, of maintaining a fresh-water barrier at the lower end of the pumping basin. In his testimony he has brought out the fact

(Testimony of Paul P. Henderson.)

that approximately 8,000 acre-feet must be left for that fresh-water barrier.

Mr. Shryock: Thank you. You may cross-examine.

The Court: Let me ask you one question. You may have given it in your testimony, but it has escaped me.

Under the stipulated judgment is there provision made for the storing by the Vails?

The Witness: That, as I remember, was covered in the stipulated judgment, yes, sir. I did not testify on that, but that is my understanding, under the provisions.

The Court: I have seen it and read it many a time, but [534] you know this is a long proceeding—

The Witness: Actually, under the stipulated judgment, both parties could store, in which case certain arrangements had to be made.

The Court: I see. I remember that it was called to my attention when we visited the premises as a part of the pre-trial proceedings, and there was water in the Vail Dam reservoir.

### Cross Examination

Q. (By Mr. Dennis): Captain Henderson, as I recall your testimony, the line which is the second line from the bottom on the graphs which are Plaintiff's Exhibit 42 reflects the flow of the Santa Margarita River as measured at the Ysidora gauging station, plus the diversions which have been made

(Testimony of Paul P. Henderson.)

by the Vails and the O'Neills either in the basin or from the river.

A. I have also taken into consideration the storage in the Vail reservoir during such times as it was in operation and the diversions of Fallbrook. [535]

Q. And can we refer to that line as the flow line so that we will know what we are talking about? A. Yes.

Q. Now, as I understand the situation, all of the pumps which are maintained and operated by the Navy or operated by anybody pursuant to leases for agreement with the Navy in O'Neill Basin, Chappo Basin and Ysidora Basin have meters on them that indicate—that adequately and accurately record all the water which is pumped by those wells.

A. I understand that that is the case. However, I have not personally investigated each of the wells.

Q. And from whom did you obtain the information showing the amount of water which the Navy had diverted or extracted from wells located in the three sub-basins, three basins which was used in conjunction with the preparation of the flow line?

A. I obtained that data from the Camp Pendleton public works office or from their records.

Q. And from no other source?

A. No other source.

Q. And from whom did you obtain the information relative to the amount of water which the Vails had extracted by means of pumps from the Temecula or Pauba alluvial basin?

A. I obtained that information from Mr. Hall.



(Testimony of Paul P. Henderson.)

On one of the first trips that we made to the Vail properties, [536] at his office, he provided me with that information.

Q. Now, Capt. Henderson, I am calling your attention to Plaintiff's Exhibit 28 and ask you if the figures which are shown on that exhibit are the same figures which Mr. Hall gave you relative to the Vail extraction from Temecula Basin?

A. I can't testify to the fact that the figures on this tabulation are exactly the same as those given me by Mr. Hall without checking it against my rough draft and tabulation, which I understood was the basis for this tabulation.

However, I would have to check them before I could testify that they were accurate.

Q. Will you do that at a later date?

Now, I believe that you were present and you heard Mr. Hall's testimony relative to the amount of water which had been stored in Nigger Canyon or Pauba Reservoir since the time that the gates were closed sometime in 1948.

A. I was present at that testimony.

Q. Were the figures that he gave at that time the same figures which you used in constructing the graphs?

A. There again I would have to check the actual figures but I presume that they were because they were furnished by Mr. Hall—they were furnished me by Mr. Hall.

Q. And do you consider that the water which is extracted by the Vails by reason of their artesian

(Testimony of Paul P. Henderson.)

wells in the Pauba Basin is from the same source of supply as that which is obtained [537] from their surface wells?

A. That would be very difficult to testify to without extensive subsurface investigations in there which I am not qualified to answer.

Q. And while you were in charge of the office of Ground Water Resources you made no such investigation?      A. I did not.

Q. And you know of no such investigation?

A. Other than the—no, I know of no other investigation through personal knowledge.

Q. Now, do you know whether the figures which Mr. Vail gave you and which you used in conjunction with the construction of these graphs, represented the water which was obtained from both the artesian wells and surface water or just what water that was.

A. The figures that I used were taken from both the artesian and surface wells.

Q. And did you take into consideration in the construction of the flow line that the water was diverted from the Santa Margarita River by means of the O'Neill ditch?      A. I did.

Q. Now, calling your attention to the graph for the year 1951-52?      A. '51-'52?

Q. Yes. That is the last page of the graph. [538]

A. Yes.

Q. Could you tell me for the period commencing the 1st of October 1951 and terminating on the 30th of June 1952 the amount of water which was ex-

(Testimony of Paul P. Henderson.)

tracted by the Navy from the three basins or sub-basins for that period?

A. I could give you that information by going into my work sheets but I do not have it here.

Q. Do you have your work sheets handy so you could pick them out during the noon recess?

A. I do. I think I could pick them out during the noon recess.

Q. Will you get that figure for me?

A. I will be very glad to.

Q. Will you also get me the figure for the amount of water which was diverted by O'Neill ditch during that same period?      A. I will.

Q. And will you get me the amount or quantity of water which was impounded behind the Vail Dam in the Nigger Canyon or Pauba Reservoir for the same period?

A. Yes. That is beginning to get into a rather voluminous group of figures. I may not be able to get them all during the noon recess but we will have them as soon as I can get them.

Q. Would you say the various exhibits which the [539] plaintiff has introduced showing the amount of water extracted from the basins during that period and the amount of water which was impounded behind the Vail dam are correct?

A. As far as I know they are correct.

Q. You have seen those exhibits and they are correct?

A. As far as I know they are correct. I did not

(Testimony of Paul P. Henderson.)

take part in the preparation of them but I assume they are correct.

Q. And could you give us the figure of the amount of water which was recorded at Ysidora gauging station during the same period of time?

A. Yes, I will.

Q. Now, are you familiar with the——

The Witness: All of—pardon me, all of those figures you want was during the water year 1951-52 as far as we have the records?

Q. Yes, from October 1st, 1951 to June 30th, 1952. A. Yes.

Q. Now, do you also have in your possession the rainfall figures for the same period showing the amount of precipitation and the dates on which it fell?

A. I did not go into the precipitation studies in connection with this work. Instead I relied upon the U.S.G.S. run-off records together with the other records maintained by the Vails and Camp Pendleton.

Q. As I understand your line which is entitled "Camp [540] Pendleton" on the graphs, that represents the total prospective agricultural use to which water could be put within the watershed and within the limits of Camp Pendleton?

A. I will have to correct that statement. That is not quite correct. The total Camp Pendleton demand line as shown on this graph, includes the Stuart Mesa demand as shown on the lower line, the total diversion as shown on the total Camp



(Testimony of Paul F. Henderson.)

Pendleton line is the actual amount of water that would be required to irrigate the riparian acreage as testified to by Major Bowen. However, in using the monthly distribution throughout the year I used a military distribution.

Q. Well, now, what do you mean by "a military distribution"?

A. Used the distribution on a monthly basis as taken from the actual diversion records on Camp Pendleton since it has been—since it has started diverting water.

Naturally, the military use would not follow an agricultural use because of the fact that in an agricultural use you have a very low demand in January and February with an excessive demand in July and August.

In a military usage that demand curve is not followed in that manner, being a much more uniform demand throughout the year.

Q. And in an agricultural use, Captain, the use would be based on the amount of water necessary to irrigate certain [541] types of crops based on an acre-feet per acre while in connection with the military use it would be based on a certain number of gallons per day per man which might be in the reservation.

A. That is correct.

Q. So that the methods of determining what would be the reasonable requirements of water for agricultural use would be entirely different from those which would be taken into consideration in

(Testimony of Paul F. Henderson.)

determining the reasonable amount that you would need for a military use?      A. That is correct.

Q. And the two might be entirely different and foreign to each other?

A. That is correct.

Q. Now, during periods such as are shown for the months of December, January and February of 1951-52 there would be considerable rainfall within the watershed of the Santa Margarita River, isn't that correct?      A. That is correct.

Q. And you wouldn't expect at that time that it would be necessary to irrigate crops which might be growing on the lands located within the watershed of the river?

A. That statement is not quite correct as shown by the irrigation demand at the Vail ranch. For instance they show a small usage during the months of December, January, February and March. [542]

The statement that the water usage during those months for irrigation is not as heavy as would be for a military use is correct.

Q. Now, when you refer to the statements of the use on the Vail ranch you were referring to Exhibit 28 or were you referring to——

A. No, I was referring to the increment between the two demand lines on Exhibit 42 of the plaintiff.

Q. And those demand lines represent average demand and not the demand, the total Camp Pendleton line for 1951-52 on Exhibit 42 which represents the average demand for the months of De-

(Testimony of Paul F. Henderson.)

ember and January and not the requirements which they would have needed for December, January and February of 1951-52, isn't that correct?

A. You mean for military use?

Q. No, for agricultural use. As I understand these lines, which are constructed as total Camp Pendleton and total Camp Pendleton plus/and Vail demand were constructed on the basis of the testimony of Major Bowen and his testimony went purely to agricultural use and he did not discuss a military use at all.

A. That is correct. The total demand for the year was the demand that Major Bowen set up as a result of his studies on the irrigable acreage riparian to the stream within the watershed of Camp Pendleton. [543]

He also set up the irrigation demand for those acreages.

Now, he did not discuss the actual per month use of that water. I believe it is shown on one of the plaintiff's exhibits, however.

Q. So that the total Camp Pendleton demand as shown by the line which you have constructed on the graphs, which is Plaintiff's Exhibit 42, simply show the amount of water which could be put to beneficial use on land lying within Camp Pendleton and within the boundaries of the watershed of the Santa Margarita River plus such water as might be used on the Ysidora Basin if and when all of those lands are devoted to agricultural use.

A. That is correct. [544]

(Testimony of Paul F. Henderson.)

Q. And that is an average line for each month? In other words, the line where it appears on Exhibit 42 for the water-year 1951-52 does not purport to show the amount of water which they would require for their lands for that year; it is simply an average for months for the 33 periods commencing in 1923 and terminating in 1952?

A. That is correct.

Q. So that actually, for the months December, January, and February of the water year 1951-1952, although all of the lands were actually devoted to agricultural use which could be devoted to agricultural use within the watershed of the Santa Margarita River, they would have required far less water than shown by your average line by reason of the fact that you would have normal or above normal rainfall for those months?

A. That is correct.

Q. Actually, with the amount of the flow which passed the Ysidora station for those months, you would assume that the rainfall was sufficient during that period so that irrigation of crops in that area would not be required or be necessary for the months of December, January, or February of the water-year 1951-1952?

A. That might be the case, depending upon the type of crops used. Ordinarily, I would say that where you have the rainfall that you would in those months, that you probably [545] would have very little irrigation.

Q. It would be impossible, would it not, for the



(Testimony of Paul F. Henderson.)

Vails and Camp Pendleton to utilize the water which passed the Ysidora gauging station during the months of December, January, and February of the water-year 1951-1952 without the erection of artificial dams and diversion structures?

A. No, that statement is not correct, in that, without an equalizing reservoir, certain water of those flood periods would enter the subterranean basin, which on a full use would have been drawn out very materially, and certain water would also be advantageous to the growing of crops in that area.

Q. Now, Captain, taking into consideration, and in constructing these graphs and the flow line, as I understood it, you intended the flow line to show the amount of water which was available during the various years shown on Exhibit 42 for use within the watershed of the Santa Margarita by the Vails and by Camp Pendleton?

A. And any other users that might decide to provide development within the stream area.

Q. But, as I take it, in constructing that line you disregarded any and all waters which were either in storage or which were available for use, which might be located in the three basins underlying Camp Pendleton and the basin that Mr. Hall testified to, that underlies the Vail properties?

A. That is correct.

Q. And yet, as I understand your testimony, you consider that the water which is located within the basins that I have just mentioned is a rather im-

(Testimony of Paul F. Henderson.)

portant source of supply to Camp Pendleton and probably also to the Vails?

A. Mr. Hall in his testimony brought out the point that, as far as the basin is concerned, it provides no source of water supply. The only water available from the basin is the flow of the streams into the basin.

Q. And that is your opinion also?

A. Yes, it very definitely is.

Q. Now, did you make any effort or any studies to determine the amount of water which was derived from the Santa Margarita River to recharge the three basins which underlie the plaintiff's property in the water-year 1951-1952?

A. In taking into consideration—I did not take into consideration what you might call the holdover storage in constructing that line, for the reason, as I testified, that this graph was merely to show the comparison between the tremendous demand for water on the full development of riparian acreage, as compared to the comparatively meager supply which would be available from the Santa Margarita.

Q. Captain, as I understand, during the water-year 1951-1952 there were no surface diversions on the Santa Margarita River or any of its tributaries of any consequence [547] with the exception of the Vail Dam at Nigger Canyon and the diversions which were made by means of the diversion dam in O'Neill Ditch.

A. That is correct.

Q. Now, any waters which may have passed over

(Testimony of Paul F. Henderson.)

the basins which are located on the Government's property, and which are recorded at the gauging station which is maintained at Ysidora, would be waters which could not in the course of nature be used to charge the three basins underlying Camp Pendleton?

A. The Ysidora gauging station is located at the lower end of the basins, and such water as passed them—passed that gauging station has already passed the basins.

Q. And, necessarily, could not recharge any portion of those basins?      A. That is correct.

Q. And, as I understand it, any waters which passed the Ysidora gauging station drain directly into the Pacific Ocean and are lost and are waste water?      A. That is correct.

Q. Now, in construction of the line which you say is total camp Pendleton and Vail demands, did you take into consideration all the demands of the Vail properties which they consider are riparian to the Santa Margarita River, including the portions of the Santa Rosa Grant which drain [548] into the Sandia and the De Luz watershed?

A. No, I did not. The area that I took into consideration in the construction of that demand line was that part of the Vail properties riparian to the Temecula River.

Q. Did you take into consideration any portion of the properties which are riparian to Murrieta Creek?

A. There is a portion of Pauba ranch which I

(Testimony of Paul F. Henderson.)

considered as being riparian to the Murrieta River, but I did not take into consideration any demand on the Santa Rosa section of the Vail properties.

Q. But you did take into consideration those portions of the property which are riparian or in the watershed of Murrieta Creek? A. Yes.

Q. In your opinion, does the gauging station which is maintained on Murrieta Creek correctly record all the surface and subsurface flow of Murrieta Creek at that point? A. Yes, it does.

Q. And, in your opinion, does the gauging station which is maintained at Railroad Canyon correctly record all of the surface and subsurface flow of the Temecula Creek, of the Santa Margarita-Temecula River at that location?

A. I do, with the exception of a very—perhaps negligible underground flow, which I think can be disregarded. [549]

Q. It probably would be less than one per cent?

A. Probably would be less than one per cent.

Q. Now, could any portion of the waters which pass the gauging station at Railroad Canyon gauging station serve any purpose to recharge the waters of the Temecula alluvial basin or the Pauba alluvial basin?

A. No, for the reason that the waters entering the Temecula Canyon have passed over the alluvial basins within the Pauba ranch or on the Murrieta watershed.

Q. And could any of the waters which are recorded at the Murrieta gauging station serve any



(Testimony of Paul F. Henderson.)

purpose so far as recharging the waters of the Murrieta basin to which Mr. Hall referred?

A. No, they could not, because of the fact that the testimony of Mr. Muehlberger was to the effect that the gauging station on the Murrieta was below the fault line of that area.

Q. Now, in respect to the construction of the line showing the historical use, as you say, of Ysidora basin, how did you obtain the information which you used in the construction of that line?

A. I obtained the diversions for that area from the office at Camp Pendleton, the Public Works Office.

Q. And was all of that water which was used on Stuart Mesa extracted from the basin or sub-basin which we [550] have designated as the Ysidora basin? A. It was.

Q. And no portion of that water was extracted from Chappo or Middle Basin, or O'Neill or the Upper Basin? A. Not to my knowledge.

Q. Now, were the same pumps which were used for the extraction of water from Ysidora basin used for both agricultural use and for camp-supply purposes?

A. I would not be in a position to testify to that question.

Q. Now, while you were in the Office of Ground Water Resources you made certain investigations in an effort to determine what the quantity of water was that was put to beneficial use on Stuart Mesa, did you not?

(Testimony of Paul F. Henderson.)

A. I took the flows of the water to the Stuart Mesa area from the records of the Public Works Office at Camp Pendleton. I did not personally go out and check to make sure that that was all used within the area designated.

Q. What records did they have in the Office of Public Works for your use?

A. There were the diversion records from those pumps.

Q. And they maintain records so that they could tell the quantity of water which was diverted to Stuart Mesa, as distinguished from the amount used within the military reservation for camp-supply purposes? [551]

A. It was my understanding that that water was segregated and the measurements were made, and those were the records I asked for and they supplied to me.

Q. And they did have such records?

A. According to my understanding.

Q. How far back did those records go?

A. I would again have to refer to my notes on that.

Q. You had no records prior to 1942 as to the amount of water?

A. That is correct. All the records I had were subsequent to 1942. I can't testify at this point whether they actually went to 1942, but they were subsequent to 1942.

Q. You are sure there were none prior to 1942?

A. That is correct.

(Testimony of Paul P. Henderson.)

Q. Now, you know, of your own knowledge, do you not, Captain, that the amount of——

A. I am sorry on that. I am in a civilian status.

Q. When I first met you I was introduced to you as Captain Henderson, and that seems to carry over.

The Court: Well, a captain is like a judge. Once a judge, always a judge.

The Witness: I just did not want to have the impression created that I am in the military service, as I am not. I am strictly a civilian.

Q. (By Mr. Dennis): You are on inactive duty?

A. On inactive duty. I do still hold a commission, but I am not here as military personnel.

Q. You do, however, know of your own knowledge and as a result of your investigation that the amount of acreage which was irrigated on Stuart Mesa varied from year to year?

A. Yes, I do know that.

Q. And you know that the quantity of water which was used in irrigating that property varied from year to year?

A. That is correct.

Q. And you know that the type of crops varied from year to year?

A. That is my understanding also.

Q. And you know that the location of the acreage which was irrigated also varied from year to year?

A. Not from personal knowledge on that, in that particular case, no.

(Testimony of Paul F. Henderson.)

Q. Now, in your opinion, would you say that it would be physically possible for the Vail interests to use any portion of the water which passed the Railroad Canyon gauging station for the period commencing December 1, 1951, and terminating April 30, 1952, without the construction of additional dams or artificial diversion structures?

A. Your question was, the water below the gauging station?

Q. The water which is recorded at the Railroad Canyon [553] gauging station, for the period commencing the 1st of December of 1951 and terminating with the 30th day of April, 1952, for that period, and for the water which passed that gauging station during that period of time, would it have been possible for the Vail interests to put that water to beneficial use on their property without the construction of additional dams on the river?

A. They could have installed pumps at that area and pumped it back on either the Pauba or the Santa Rosa ranch, but they could not use it as a gravity surface supply. [554]

Q. And during that period of time there was sufficient water or sufficient rainfall to show that the irrigation needs would be negligible?

A. Would at least be very small.

Q. Very small during that time? A. Yes.

Q. Now, for the same period the water which was recorded at the Ysidora gauging station, would it have been possible for the Government to put that



(Testimony of Paul F. Henderson.)

water to beneficial use during that period without the construction of a dam on the river?

A. They could not have used it through a gravity flow but they could have used it by pumping.

Q. And the only pumping that they would have occasion to use the water for would be for military purposes. Agricultural requirements during that period would be very negligible?

A. Probably very low, yes.

Q. And as a result of the investigations which were made while you were in charge of the Office of Ground Water Resources, are you in position to say whether or not the monthly requirements for military use are substantially the same as during the dry period of each water year as they were during the so-called wet period of the water year?

The Court: I think he answered that. He drew a distinction between agricultural use as having a peak—a high [555] and low, while the other is more or less constant. I think the witness used the word uniform but I was thinking of the word constant.

The Witness: That is correct.

Q. (By Mr. Dennis): There is a uniform demand?

A. Much nearer a uniform demand on a military use than on a strictly agricultural use.

The Court: But in postulating the two, you postulate the identity of quantity except one would go high and low and the other would be spread more uniformly.

The Witness: That is correct, your Honor.

(Testimony of Paul F. Henderson.)

Q. (By Mr. Dennis): So that for agricultural use during seasons when there is no rainfall or during months—during the rainy season when there is practically no rainfall, you would have approximately a peak agricultural use but during those periods when there is heavy rainfall you would have practically no agricultural use?

A. Yes, that is correct and as is reflected in the demand curve on Plaintiff's Exhibit 42.

Q. And would you say that for each period during the time when you constructed these various graphs that you would give the same answers relative to the water which passed Ysidora gauging station and Railroad Canyon gauging station and Murrieta gauging station as you gave to the year 1951-1952?

A. That is correct. [556]

Q. That is any and all waters which passed those gauging stations would serve no purpose so far as recharging the basins are concerned which are upstream?

A. That is correct.

Q. And I believe that you testified that you made a personal inspection of the watershed on numerous occasions?

A. Yes, I did.

Q. And you had an opportunity to observe the properties which were owned by the Vails and which lay upstream from the Nigger Canyon gauging station?

A. Yes. I walked over portions of them, drove over them in a car and flown over them.

Q. And as a result of your studies you have observed and know of your own knowledge that there

(Testimony of Paul F. Henderson.)

are large quantities of water collected in the watershed of the Santa Margarita-Temecula River which are obtained from run-off watersheds which join the main river at a point below the Nigger Canyon gauging station?

A. I didn't follow that question.

Mr. Dennis: Will you repeat the question?

(Question read.)

Mr. Dennis: Maybe I could simplify that.

A. I wish you would.

Q. In other words, your studies indicate to you that the water which passes the Railroad Canyon gauging station [557] in each and every year and in each and every month exceed the quantities which passed the gauging station at Nigger Canyon?

Mr. Shryock: If you know, Mr. Henderson.

The Witness: In a study of the U.S.G.S. run-off records I had occasion to compare the run-offs at Nigger Canyon gauging station and those at the Temecula gorge and according to my memory in every case there is more water available in flood periods, of flood flow, at the Temecula gorge than there was at the Nigger Canyon reservoir.

Of course in low flow periods on certain occasions the U.S.G.S. records showed more water at the Nigger Canyon reservoir than was available at the railroad gauging station.

Q. And in those instances that would be due to the diversions above the Nigger Canyon and——

A. It would be either due to diversions or due to the water entering the underground basin.

(Testimony of Paul F. Henderson.)

Q. Now also during periods of peak flow you have discovered, have you not, that the flow as measured at the Fallbrook gauging station exceeds the flow at the Nigger Canyon-Temecula gauging station?

A. I would have to go through the records to state that in every case that was true.

Q. You made no such study?

A. No, I made no such study. [558]

Q. Did you make any study to determine whether or not the flow at Ysidora gauging station exceeded the flow at the Fallbrook station during periods of peak flow?

A. If you confine that to periods of peak flow I would say that in all probability your gauging station at Ysidora would show a higher discharge than at the Fallbrook. However, in order to make a definite statement on that it would require considerable study and comparison between the flows at the two points. I made no such study.

Q. You made no such study. However, to make such a study all you would have to do is inspect the U.S.G.S. records of the flow at those stations?

A. That is correct. That is part of the exhibits before this court.

Q. And as I understand your testimony the climatological data was disregarded in connection with the lines which you constructed on these graphs?

A. That is correct. The lines were constructed purely from a stream-flow record as used by the



(Testimony of Paul F. Henderson.)

United States Geological Survey and published in their records.

Q. Now, I believe that you heard the testimony of Mr. Worts that the three sub-basins or basins underlying Camp Pendleton had a water holding capacity, a usable water holding capacity of approximately 40,000 acre-feet. A. That is correct.

Q. Do you agree with that figure?

A. I have no way of checking that figure.

Q. You made no investigations, or there were no investigations made under your office in the office of Ground Water Resources while you were in charge of it?

A. I made no investigation of that basin and none were made during the time that I was at the office of Ground Water Resources.

Q. And I believe you testified that during the periods of peak loads that the water rushes across the three basins with such velocity that there is very little chance for seepage?

A. That was not my testimony. My testimony was to the effect that if you could reduce the rate of flow across these basins you could induce more water into the underground basin.

Q. Provided that the basins were not full to capacity at the time the water was passing over the surface of the basin?

A. If the basins were full you couldn't get any seepage into them.

Q. While you were in charge of the office of Ground Water Resources did you have any studies

(Testimony of Paul F. Henderson.)

made or have you any information in your possession which would show the static water table in the three basins in question during the year of 1948-1949? [560]

A. All of that work was under the direction of Mr. Worts and I have no information concerning it and made no investigation of those static water levels.

Q. And you didn't take that into consideration when you constructed the charts which are Plaintiff's Exhibit 42?

A. As I previously testified I didn't take the time to make those investigations.

Q. Now, are you familiar with the term cyclic storage? A. I don't believe I am.

Q. And when you use the word "temporary storage" what did you have in mind?

A. Just for the purpose of reducing the rate of flow to the point where the water could be introduced into the subterranean basins. It was not the intention—I take it that you are referring to my statement concerning equalizing reservoir above the basin?

Q. Or your understanding of the term "temporary storage"? A. That is right.

Q. In other words, would you consider the storage of water in December for use in October of the next year to be temporary storage?

A. It was my statement that we would use the storage back of the equalizing dam to hold the

(Testimony of Paul F. Henderson.)

water just long enough to introduce it into the subterranean basins.

Q. And that would be held in back of the dam and [561] would probably all be introduced into the O'Neill basin and the upper portion of Chappo Basin?

A. That is correct.

Q. In other words, the clay blanket or cap which covers the lower portion of Chappo and Ysidora Basin would prevent any substantial amount of water percolating into those basins.

Mr. Shryock: If he knows whether such a clay blanket or cap exists.

Q. (By Mr. Dennis): You heard the testimony of Mr. Worts that there was a clay cap over Ysidora Basin and over the lower portions and Basilone Ford and Chappo Basin?

A. My memory of Mr. Worts' testimony is he stated that the soils in that area were much finer and that a clay cap did not exist. That is according to my memory of his testimony.

Q. (By Mr. Dennis): That is as to over Ysidora and the lower portion of Chappo?

A. I do not remember the exact extent of that finer soil.

Q. Are you familiar with the types of soil which overlie Ysidora Basin and Chappo Basin and Basilone Ford?

A. Major Bowen is a soil technologist and I did not go into that phase of the study in the least, depending entirely on information from Major Bowen.

(Testimony of Paul P. Henderson.)

Mr. Dennis: That is all. [562]

Mr. Shryock: Mr. Grover?

Mr. Grover: I do have a question at this time.

The Court: Yes.

Cross Examination

Q. (By Mr. Grover): Directing your attention to Exhibit 42 and the third line up there, "Total Camp Pendleton," I should like to ask if the total for the year—did I understand you correctly to say that the total for the year as determined by Major Bowen's testimony of the total acreage and the amount of irrigation water that would be necessary?

A. That is correct. In setting up the total Camp Pendleton curve I used the acreage, the riparian acreage as determined by Mr. Bowen's study, the water duty as determined by Mr. Bowen or by Major Bowen.

Q. So that even though a greater military use during the year could have been made. You regard yourself limited on this chart by the total irrigation use according to Major Bowen's testimony?

A. No, as a basis of this curve I started with the premise that the water which could be used on the Camp Pendleton area was the amount of water to which the riparian irrigable acreage would be entitled under agricultural use, but I divided the monthly demand on a military demand rather than a strictly irrigation demand. [563]

Mr. Grover: Thank you.



(Testimony of Paul P. Henderson.)

The Court: In other words, the total is the same by the year?

The Witness: That is right.

The Court: But there is no great deviation from month to month as there would be in the case you used the same water and applied it to the maximum agricultural needs?

The Witness: That is correct, your Honor.

The Court: All right.

Mr. Dennis: If your Honor please, I would like to have the opportunity of asking Mr. Henderson some questions this afternoon when he brings that information in that I requested.

The Court: Will you have that information this afternoon?

The Witness: I hope to have it. There was rather a voluminous tabulation.

Mr. Shryock: That brings me to inquire into the exact nature of our obligation to furnish information this afternoon.

As I understand it, in the first place it is confined to the water year 1951-52.

Mr. Dennis: That is correct.

Mr. Shryock: In the second place you want to know what figures we have on impounded water in the Vail dam.

Mr. Dennis: I wanted to get the figures from Mr. Henderson that he used in constructing the flow line for the year [564] 1951-52.

Mr. Shryock: And you are referring to the total Camp Pendleton-Temecula flow line?

(Testimony of Paul F. Henderson.)

Mr. Dennis: He said he took into consideration the flow at Ysidora during that period of time and took into consideration the amount of water which the Government pumped during that time and that he took into consideration the water that the Vails extracted that time. That he took into consideration the amount of water which was diverted at O'Neill ditch and the amount of water diverted by the Vail dam.

Now, I want to get each one of those figures so that I can compare them with the flow line which he has constructed on the chart.

Mr. Shryock: And the flow line you are referring to is the upper one.

Mr. Dennis: That is the line we said we would call the flow line which shows the total amount of water which passed the Ysidora gauging station, plus such diversion—major diversion, I believe the term was, and it is the next—the line which starts just below the figure 1 in October and has two peaks which show 22,520 on one and 31,310 on the other.

The Court: While you were reeling these off so easily the witness was worrying whether he can give you that information in such short time. We had better consult him.

Mr. Shryock: Do you feel you can supply that?

The Court: If it is not available then we will reserve the right to have you recall him later on, say tomorrow or whenever we convene after next week.

(Testimony of Paul F. Henderson.)

The Witness: I think I have it all in my brief-case. However, I may have some of the figures in Portland.

The Court: Suppose you tell us this afternoon after you come back what figures are missing.

The Witness: I shall, your Honor.

The Court: And then as to such portions that are missing we can make such arrangements as are necessary to have them here.

It may be there are corresponding figures available at the camp.

The Witness: That could be, yes, sir.

Mr. Shryock: If your Honor please, I have only one question. May we have it clear for the record that when we refer to the Railroad Canyon gauging station that is also the Temecula gorge gauging station, is it not?

The Witness: That is correct, they are identical.

Mr. Shryock: Thank you, Mr. Henderson, that is all.

The Court: I think, gentlemen, due to the fact it is only a few minutes to noon and I have other work to do, and I do not want to break into the continuity of this testimony in case the other information is available, I think I will let you go early to lunch. [566]

Mr. Dennis: If your Honor please, I wonder tomorrow if we might adjourn a little early?

The Court: Tomorrow afternoon?

Mr. Dennis: Yes.

The Court: Well, you remind me of that at the time.

Mr. Dennis: I am in this situation. My son got himself engaged and they are throwing a large party out at Beverly Hills and my wife says I have to be there.

The Court: That is a momentous occasion.

Mr. Shryock: I might say, your Honor, I certainly don't want to interfere with such a momentous occasion but we had been hopeful, not too hopeful, but somewhat hopeful we might conclude our case tomorrow.

The Court: I will tell you what we might do. We might cut the noon hour short if this information is available. I had the idea that possibly you were nearing the end. We will see what happens this afternoon and it may be possible tomorrow to cut the noon hour in view of the fact, as you already well know, that we will not hold court the following week. [567]

Mr. Shryock: Yes, sir.

The Court: And then, you see, whenever you finish, then Mr. Dennis need not present any testimony until when I come back from my Nevada assignment. That will give him nine or ten days in which to organize his material and supply any facts which he has not ready at the present time.

Gentlemen, and I think Mr. Dennis knows this, I am very strict in trying to conserve judicial time. That is not because I cannot enjoy leisure. As a matter of fact, I can enjoy leisure in several languages, as Commander Shryock has noticed by



noticing some of the foreign books I like to read, and foreign magazines, and so forth, to get away from the monotony of reading law all the time. But I am a member of a very busy court in a very litigious community, and in the 26 years I have been a judge in this court or the Superior Court I haven't found an easy way or easy hours yet. But at all times it is a flexible rule that is subject to the needs of the parties themselves, so there will be no loss to the litigants, and I am here to hear them, whether private persons or the Government.

So if you finish tomorrow, I will make this promise: no matter when you finish, once you say you have rested, you can go home until the following Monday or Tuesday. I will tell you when to come back, tomorrow. I will look to see what I have on a week from Monday. It may be that I will ask [568] you to come back on Monday rather than Tuesday. At any rate, you will have at least eight days between the time they close, if they close tomorrow, and if we carry over, you will know it will also not be very long. But I will co-operate with you, even if we cut the noon hour to 45 minutes.

Mr. Dennis: I think there is one question, your Honor, which is bothering us. The case was continued as to the Fallbrook Public Utility District to the 18th, and with the anticipation that the order of the Ninth Circuit is vacated, as it is continued to that time, we will proceed with Fallbrook then?

The Court: Mr. Swing is not here?

Mr. Dennis: He is not here today.

The Court: I will say that that was a rather optimistic speculation on my part. For one thing, however, I have not made my return as yet. For another thing, I don't mind telling you what is happening, because the Attorney General has notified me that they find it physically impossible to complete the presentation of the matter at that time. The order is rather unusual. I do not know why it is unusual. In the past, and you will remember the other one, they fixed a time for the hearing and they fixed a time for the return. Evidently they did such a hurry-up job in this instance that they merely said to answer within ten days, and they did not designate the ten days, and then did not say when the matter [569] is to be heard.

Mr. Dennis: I noticed that, your Honor.

The Court: You noticed it. I do not want to criticize the judges of that court, but I am pointing to the fact that there are certain deficiencies in that order. So a request will be made from Washington of the court that they fix a definite date for the return and that it be extended to allow the mechanics of physically producing the document and having it flown here to me to sign.

I may say also that the outline of the document—not of the brief—has been submitted to me, and I have approved it over the long-distance telephone. So that, when that is done, a time will be fixed.

I will therefore trail the other case behind you until I know more definitely, but I am certain now that the date of the 18th has become meaningless in view of what has happened.

Mr. Dennis: And we will continue to put on our case before any part of the Fallbrook case is heard?

The Court: That is right, because this case is severable, and, as I say, if there are any phases so far as between you and the others, we will keep the case open for that purpose.

In other words, gentlemen, we are trying these cases in the way in which for 26 years I have tried condemnation cases. I have tried them in the Superior Court and I have [570] tried them here, and where there are severable controversies you can try issues and send a group of attorneys home. You can say, "You go home and then come back later."

Then when we go to trial as against Fallbrook, I will send you home, because you do not want to hear all this testimony over again, and it may well be that Mr. Swing, having a record, will be content with calling the witnesses back and just cross examining them. If not, we will go through the same thing again, and while that is going on, I will send you home and call you back when any question of your rights is involved. My methods are very flexible, and I will bend them to the "shorn lamb," as the Bible says.

Mr. Dennis: So in the trial of Fallbrook, if the plaintiff is required to put this same type of evidence on again, I will not be required to be present?

The Court: No. I will protect your record. In other words, I am not going to waste your clients' money by going over it again so far as they are concerned. If that is the order, and if he insists on going to San Diego, I will get a place there. I

have a nice big storeroom there. This is off the record.

(Statement off the record.)

The Court: If he insists on doing it, as I say, I will take him there where I can get a courtroom for free.

Mr. Dennis: Thank you, sir. [571]

Mr. Shryock: Thank you.

The Court: I might also say that I have imported a judge for San Diego. The calendar is in bad condition there, and a judge from Honolulu has been flown here, who is sitting in the little courtroom now, and beginning next month Judge McCulloch will be there, and he will be there until March 1st. At that time possibly I might have the use of that little courtroom which has taken me ten months to secure. Then the second hearing room might be available, but I do not propose to continue this case until that contingency, because I want to get through with it as quickly as I can.

All right, gentlemen, two o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [572]

Thursday, November 6, 1952, 2:00 p.m.

The Court: Before you start, one advantage of having this case in the headlines is that the newspapers keep me informed of what is going on.

Mr. Ainsworth just called Mr. Austin of the Times and Mr. Austin called me and informed me that the time for appearance in the Court of



Appeals has been changed to the 24th of this month. So, that works in with the plan that we were talking about this morning.

You may proceed.

Mr. Shryock: Your Honor, at the conclusion of the proceedings this morning the preceding witness, Mr. Henderson, was to determine whether or not he had here in Los Angeles certain information which Mr. Dennis requested.

Upon investigation he finds that all or practically all of that information is up in Portland, Oregon.

We have two suggestions to make, your Honor. One would be that upon his return to Portland Mr. Henderson could obtain that information, record it and send it to us so that we could submit it to Mr. Dennis. That is No. 1.

Or, if that were not acceptable, that when and if Fallbrook is back in the case, necessarily Mr. Henderson's appearance would be required. He then could question the witness on that point. [573]

Mr. Dennis: I think that we will be satisfied with that.

The Court: Let me suggest that the first suggestion is much better because then I can leave it open and just say the examination is concluded subject to your examining this information and that if by reason of the information you receive you desire additional testimony we will bring him down here for you at any stage of the case before it is closed.

Mr. Dennis: That is satisfactory, your Honor.

The Court: Maybe the information will be so obvious you won't need any cross examination.

Mr. Dennis: I anticipate that it will be as you mention, obvious, and I won't have to ask any questions.

Mr. Shryock: We shall adopt the first suggestion of the court.

The Court: If he is through and wants to go back to Portland he may.

You may proceed.

Mr. Shryock: Mr. Witman, will you take the stand, please?

# HENRY W. WITMAN

called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Henry W. Witman. [574]

## Direct Examination

Q. (By Mr. Shryock): What is your residence address, Mr. Witman?

A. 108 South Pacific, Oceanside, California.

Q. And what is your occupation?

A. I am a rancher.

Q. You operate a lemon grove?

A. Yes, sir.

Q. Now, Mr. Witman, have you in your lifetime been connected with the property known as Rancho Santa Margarita?

A. Yes, sir.

Q. When did that connection first begin?

A. In 1920.

(Testimony of Henry W. Witman.)

Q. Do you recall what month, approximately?

A. I believe it was September, either August or September of 1920.

Q. And in what capacity did you establish a connection with the Rancho Santa Margarita?

A. I came as a tenant.

Q. And what, approximately what acreage were you leasing? A. Approximately 1500 acres.

Q. And for how long did that landlord-tenant relationship continue? A. Until July, 1922.

Q. And what happened at that time?

A. I went to work for Rancho Santa Margarita.

Q. In what capacity?

A. I was foreman of the farming operations.

Q. And did you have anything to do with the cattle on the ranch? A. At that time no, sir.

Q. And when you came to the property in 1920 did you acquire any familiarity with the ranch as a whole—in general? I mean its physical features?

A. Yes, I did.

Q. For example was there any lake on the ranch in 1920? A. Yes, the O'Neill Lake. [576]

Q. How recently have you seen the O'Neill Lake? A. Why, about 90 days ago.

Q. Could you say whether or not it is substantially the same as it was when you first saw it in 1920, with the exception of possibly raising the levee? A. It is exactly the same.

The Court: You mean the works have not been changed?

The Witness: The levee has been raised, sir.

(Testimony of Henry W. Witman.)

The Court: Oh, yes, I forgot that. Except for that?

The Witness: The location is exactly the same.

Q. (By Mr. Shryock): Now, you continued as superintendent——

The Court: I don't remember, from the description and from what we saw, whether the contour of the lake is natural on all sides except on the side where the levee is run.

Q. (By Mr. Shryock): Could you explain that to the court?

A. Yes, it is in a natural contour except where the levee was put across.

The Court: That was my recollection. Thank you.

Q. (By Mr. Shryock): Now, taking the period between 1926 and 1942, in what capacity were you connected with the Ranch?

A. Well, I was made general superintendent in 1926, and in 1936 I was made general manager.

Q. Of everything? A. Yes, sir.

Q. And in those capacities, Mr. Witman, did you come to be acquainted with all of the physical features of the ranch, the properties, what was on them, and the uses to which the lands were put?

A. Yes, sir.

Q. Are you familiar with the areas known as Stuart Mesa and South Coast Mesa?

A. Yes, sir.

Q. Now, I believe you say you became general manager in 1936 or '37? A. Yes, sir.



(Testimony of Henry W. Witman.)

Q. Up until that time had either of those mesas I have mentioned been cultivated?

A. Yes, sir.

Q. Had either of those mesas been irrigated?

A. No, sir.

Q. During your tenure as the general manager of the ranch, would you state what, if anything, was done with respect to those mesas as to irrigating them for agriculture?

A. Wells were drilled in the Ysidora basin and pipe lines were installed on both sides of the river, booster pumps, to the mesa lands on either side, and distributing lines were installed. [578]

Q. Now, when you say "the river," what river do you refer to?

A. The Santa Margarita River.

Q. Do you recall what the approximate acreage of the Stuart Mesa is?

A. Approximately 1200.

Q. And what about South Coast?

A. In the neighborhood of 600.

Q. If you know, of the 1200 in Stuart, about how much of that is outside of the watershed of the Santa Margarita River?

A. Well, I think approximately three-fourths of it is outside of the Santa Margarita watershed.

Q. Perhaps 900 acres? A. Yes.

Q. And what about South Coast?

A. About half of the lands that we irrigated were; about half outside the watershed.

Q. Now, when this irrigation was begun, how

(Testimony of Henry W. Witman.)

much of the 1200 acres on Stuart Mesa was put to irrigation?

A. The entire area was put into irrigation in 1938. The wells and pipe lines were installed in 1937, in the winter of 1937.

Q. And in the spring of 1938 did you actually begin their use? [579]

A. We began irrigating the entire mesa, yes, sir.

Q. And does that apply to South Coast?

A. No, that was the following year.

Q. Then in 1939 did you start irrigating the South Coast Mesa?      A. Yes, sir.

Q. Was that continuous as long as you were connected with the Ranch Santa Margarita?

A. Yes, sir.

Q. Every season?      A. Yes, sir.

The Court: How did you irrigate, by ditches or pipe lines?

The Witness: Pipe lines, cement pipes, and short runs of earthen ditches, by pipe lines in most cases.

The Court: Did you at any place because of the terrain have to use those surface pipes with flexible joints?

The Witness: Not on the mesa, sir; no, sir.

The Court: Did you use them anywhere on the ranch?

The Witness: Yes, we did. We used them some places in the valley ranch.

Q. (By Mr. Shryock): Now, Mr. Witman, you mentioned wells were drilled. Were those wells drilled with any specific purpose in mind?

(Testimony of Henry W. Witman.)

A. They were drilled for use on those mesa lands. [580]

Q. And from what source did the water come through those wells? Where was the water pumped from?

A. From the lower Ysidora Valley, the lower Ysidora basin. [581]

Q. Have you been connected with the property which was known as Rancho Santa Margarita down to the present time?

A. Yes, sir.

Q. In what capacity are you now connected?

A. I am a tenant.

Q. You have made the full cycle?

A. Yes.

The Court: Was that a demotion or promotion?

The Witness: Just where I started.

Q. (By Mr. Shryock): Of what lands are you a tenant, Mr. Witman?

A. Lemon grove.

Q. Well, is that one lemon grove?

A. Both. Well, it is the entire lemon acreage, part of which is on the Stuart Mesa and part of it is on South Coast.

The Court: Is that your old lemon grove? Is that the same lemon grove you had years ago?

The Witness: Well, it was planted in 1939, Judge.

Q. (By Mr. Shryock): And does a part of that lie inside the watershed?

A. Yes, sir.

Q. How many acres would you estimate?

A. 65, I think.

Q. And how many acres outside the watershed?

A. 40. [582]

(Testimony of Henry W. Witman.)

Q. Could you operate those lemon groves without water, Mr. Witman? A. No, sir.

Q. You have been intermittently familiar with the agricultural lands which are embraced within the ranch, have you? A. Yes.

Q. Do those lands have any particular climatic advantage compared to other lands, lands in Southern California?

A. The coastal lands very definitely have.

Q. What is the particular advantage?

A. The temperate climate, frost free.

Q. Are there very many frost free areas in this part of—that part of California?

A. No, sir.

Q. How many pickings a year do you get out of lemons? A. From seven to eight.

Q. How does that compare with lemons raised on land which is not frost free?

A. Well, that is—I think, as I say—now, this is just my opinion as possibly a non-expert but I think that is about two more pickings a year than the average grove on account of the frost free condition. The blooms are never taken from the trees.

The Court: Do you mean to tell me there is a place in [583] California where there is a frost free belt and you have that place?

The Witness: (No answer.)

Q. (By Mr. Shryock): At the time that you were—withdraw that.

While you were still identified with the ranch



(Testimony of Henry W. Witman.)

in your capacity as general manager, Mr. Witman, were you familiar with your tenants?

A. Yes, sir.

Q. Did you ever have the State of California as a tenant in your time?

A. No, I don't believe so.

Q. Are you familiar with the property now operated by the state in the ranch property?

A. (No answer.)

Q. If not say so. If you don't know say so.

A. I do not know, no, sir.

Q. Mr. Witman, will you describe the relative location of the South Coast Mesa and Stuart Mesa with particular reference to United States Highway 101 and the ocean and the ranch?

A. Well, the South Coast Mesa, of course, is the south edge of the ranch on Santa Margarita River, which is now entirely Camp Pendleton and it embraces a strip of the coastal mesa which is on both sides of the state highway until you [584] reach the Santa Margarita River.

Q. And on the oceanward side does it go all the way down to the ocean?

A. To the bluff, yes, sir. It drops to the beach.

Q. Then north of the river?

A. North of the river it is exactly the same. It extends inland a little farther. It is a larger mesa.

Q. That is the Stuart Mesa?

A. The Stuart Mesa.

Q. And it is on both sides of Highway 101?

A. Both sides of Highway 101. There are about

(Testimony of Henry W. Witman.)

400 acres west of the highway and approximately 100 acres east.

Q. Does that Mesa go up as far as Cocklebur Canyon? A. Yes, sir.

Q. Is that generally thought of as the northern limits of it? A. That is right.

Q. One further question. So far as you know, Mr. Witman, has there been any interruption in the irrigation of the mesa since it was begun in 1938 or 1939? A. No, sir.

Q. And is the underground basin where those wells were drilled the only source of water for that irrigation system? A. Yes, sir. [585]

Mr. Shryock: Cross examine.

### Cross Examination

Q. (By Mr. Dennis): Mr. Witman, when you testified that was the only source of water for that mesa, you meant to say that that was the sole supply of water for that mesa at the present time and that has been derived from those wells?

A. Yes, sir.

Q. But there might be other sources of water?

A. That is right.

Q. Approximately how many boxes of lemons do you get per acre from the lemon grove?

A. Between seven and eight hundred.

Q. Have you ever run short of water from the wells drilled in the Ysidora Basin?

A. No, sir.

Q. There has always been plenty of water?

(Testimony of Henry W. Witman.)

A. Yes, sir.

Mr. Dennis: I think that is all.

The Court: That is all.

Mr. Shryock: Thank you very much.

The Court: Call your next witness.

Mr. Shryock: Mr. Taylor. [586]

### WILLIAM D. TAYLOR

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: William D. Taylor.

### Direct Examination

Q. (By Mr. Shryock): What is your residence address, Mr. Taylor?

A. 1650 San Luis Rey Avenue, Vista, California.

Q. And what is your occupation?

A. I am a ranch manager of Camp Pendleton.

Q. Are you a college graduate, Mr. Taylor?

A. I am.

Q. From what institution?

A. University of Idaho.

Q. When? A. 1938.

Q. With what degree?

A. Bachelor of Science degree in forestry and range management.

Q. And will you state very briefly what your employment was following your graduation from college?

(Testimony of William D. Taylor.)

A. Soon after my graduation I took employment with the Soil Conservation Service of the United States Department of Agriculture. [587]

I operated soil and range survey studies for approximately two years. Then I went to San Diego County as a soil conservation farm planner. [588]

The Court: For the State?

The Witness: For the Federal Government.

The Court: For the Federal Government.

The Witness: Where I was for approximately eight years, until 1948, when I went to Camp Pendleton.

Q. (By Mr. Shryock): Have you been continuously employed at Camp Pendleton since 1948?

A. That is right.

Q. What are your duties——

The Court: Are you on loan, too, or did you go over——

The Witness: No, sir, I am civil service with the Marine Corps.

The Court: Oh, you are with the Marine Corps?

The Witness: That is right.

Q. (By Mr. Shryock): Mr. Taylor, what are your duties there as ranch manager?

A. Well, my duties are partly administrative and partly technical, and my primary responsibility is the conservation of natural resources of the land, the property, all of the natural resources.

Q. And that would include lands which are not necessarily agricultural or cultivatable?

A. That is correct.



(Testimony of William D. Taylor.)

Q. Is one of your particular responsibilities the non-military land, that is, land not presently being used for [589] military purposes?

A. That's right.

Q. What is done with that land?

A. To the greatest extent possible, any land that is not immediately needed for military purposes is put into some peacetime use, in order that it won't be wasted.

Q. Do you have any idea how much acreage now is leased for agricultural use?

A. For farming?

Q. Yes. A. Approximately 5500.

Q. Do you recall what that approximate figure was when you came to the ranch or to the camp in 1948? A. Approximately 6,000.

Q. Now, that is for agricultural use, that we generally think of as cultivation of the land itself, is it not? A. Yes, sir.

Q. Is there also any additional agricultural use, such as grazing?

A. We graze every possible acre we can get livestock on without interfering with military activity.

Q. What livestock are you grazing on the camp right now?

A. Primarily sheep, but we have quite a few cattle also. [590]

Q. Do you have any idea how many head of cattle?

A. Do you mean within a year, Commander?

(Testimony of William D. Taylor.)

Q. Yes.

A. We had between 15,000 and 20,000 animal units of sheep last winter, and in the neighborhood of 1,000 animal units in cattle.

Mr. Dennis: May I have the figure on the sheep again?

The Witness: Between 15,000 and 20,000.

Q. (By Mr. Shryock): Now, I believe you stated that among your duties was the conservation of the soil and general features of the land itself within the camp areas?

A. That is correct.

Q. What steps, if any, are taken to improve the conditions of those lands? Are there any plans?

A. We encourage farmers to the best of our ability, and I do make a certain—or do a certain amount of planning, that is, technical assistance with those farmers, very much the same as I was accustomed to doing previously with the Soil Conservation Service.

Q. Now, as to lands which are not leased to farmers, is there any program which you have instituted or with which you are connected so far as the land is concerned?

A. Well, we have worked considerably on the Santa Margarita River bottom in water-conservation measures.

Q. What have been the steps taken in that regard? [591]

A. Well, we have made some attempt to devise spreader basins in the bottom to recover all water that would normally be wasted into the ocean.

(Testimony of William D. Taylor.)

Q. Would you describe how they operate?

A. They are simply small sand dikes which hold back the high water during the winter and spring months, and raise the pressure, in order that it will penetrate somewhat more into the ground rather than running right off.

Q. And will also spread; is that it?

A. That is right. It spreads over a much larger area.

Q. Does removal of phreatophytes come within that program?

A. Yes, it does.

Q. Has that been done?

A. We have removed in the neighborhood of 200 acres of phreatophytes.

Q. What specific—what phreatophyte?

A. Salt cedar, so-called tules, willows, and a plant commonly known as water moldy. *Baccharis* is the scientific name. It has any number of common names.

Q. Will you spell that?

A. B-a-c-c-h-a-r-i-s.

Q. Do these plants you remove have any economic value?

A. None, to my knowledge.

Q. Do they have any common characteristic?

A. They are all water lovers.

Q. And water users?

A. Water users, high water users.

The Court: Do they grow at places where they might prevent erosion? Do they have some value as such?

The Witness: Not a great deal, sir. They have

(Testimony of William D. Taylor.)

a tendency to clog up a channel so that the water which would normally follow the natural channel has to go elsewhere, and actually they have a tendency to increase erosion on the channel rather than otherwise.

The Court: Something like roots getting into a clap pipe and stopping it up?

The Witness: That is correct, yes, sir.

Q. (By Mr. Shryock): Now, Mr. Taylor, are you familiar with the irrigation of the areas known as Stuart Mesa and South Coast Mesa?

A. I am.

Q. Are they under lease at the present time?

A. They are.

Q. Do you have any idea what acreage of Stuart Mesa is irrigated?

A. Over a period of a year, somewhere in the neighborhood of 1,000 acres. On Stuart Mesa, did you say, Commander?

Q. Yes. A. Yes. [593]

Q. How much of that is outside of the watershed, if you know?

A. I know only from perusal of maps that have been made. I believe it is impossible to tell by the ocular system of going out and looking. I have studied a map. The acreage outside of the watershed, of that 1,000, is approximately 800.

Q. Where does the water come from?

A. The water comes from the underground basins in Ysidora.

Q. And is pumped? A. It is pumped.



(Testimony of William D. Taylor.)

Q. Is water obtained from any other source for the irrigation system?

A. Not to my knowledge.

Q. Now, I believe you said that there were about 1,500 acres of Camp Pendleton leased out for farming purposes; is that correct?

A. That is correct.

Q. Is that the maximum or anywhere near the maximum amount suitable for such cultivation that you could lease?

A. No, sir, it is nowhere near the maximum amount. [594]

Q. Now, why have you not leased more than 5,500 acres?

A. Primarily, basically for two reasons. There isn't enough water for one and a good deal of the land is used by the military and it is not available.

Q. Well, is there land available and suitable for cultivation which is not leased?

A. Yes, there is.

Q. Why isn't it leased?

A. Because there is not enough water.

Q. Now, Mr. Taylor, I gather from your testimony that you do not have a great deal to do with the military aspect of the camp, is that correct?

The Court: That is an understatement.

The Witness: Not exactly. It would be rather difficult to be located right in the center of the

(Testimony of William D. Taylor.)

camp without having much to do with the military. I am constantly associated with them.

Q. (By Mr. Shryock): Will you state the terms on which you lease camp property to farmers and cultivators with respect to the military nature of the camp?

A. There are clauses in all of the leases providing for revocation at will. Further, all of the tenants, regardless of where they are situated on the camp, understand that the military may trespass on their land while they are under lease and of course the military is very anxious to be, you [595] might say, gentlemen about that. They give the best notice that they can in cases where it is necessary to trespass. But the farmers are—all the farmers—they all know that that could happen.

The Court: They are an understanding lot.

The Witness: That is right.

Q. (By Mr. Shryock): What degree of co-ordination is there, let us say, with respect to these thousands of head of sheep and cattle where they might interfere with military maneuvers?

A. Well, it is one of my jobs to see that that never happens.

Q. Well, suppose that you had sheep grazing in a certain area and you were advised by your military colleagues that there was going to be a maneuver there, what would you do about it?

A. I see the sheep herder at the earliest possible moment or at the right moment and make sure that the sheep are either off of the reservation or

(Testimony of William D. Taylor.)

in some other part of the reservation.

Q. That is one of your duties?

A. That is right.

The Court: Do you have corrals there or what do they call those places?

The Witness: They have temporary corrals.

Q. (By Mr. Shryock): Can you tell us anything about the potential increase of grazable vegetation in the camp? A. (No answer.)

Q. In other words, with respect to grazing plans and erosion control and so forth?

A. (No answer.)

Q. Is there grazing land which with sufficient water and proper control could be added to the acreage now available?

A. Oh, a great deal of land, yes, sir.

Q. How much would you say?

A. I would guess or estimate that in the river valley itself, which is ideally suited to grazing, there is at least 3,000 acres of land.

Q. 3,000 acres which what?

A. Which could be developed into excellent pasture.

Q. Is there anything which prevents that from being done?

A. Lack of water primarily.

The Court: What is the ownership of these animals?

The Witness: They are tenants, your Honor. They are not lessees. They are permittees. They have permits.

(Testimony of William D. Taylor.)

The Court: And you charge them for grazing on the land?

The Witness: Yes, sir.

The Court: I didn't know whether the Government was in the sheep business in competition with private enterprise or [597] not. Somebody might resent that.

The Witness: That is right.

Q. (By Mr. Shryock): Now, Mr. Taylor, who is given or who reserves the right to revoke the leases that you mentioned?

A. The commanding general.

Q. Is there any provision in your leases as to the cut-off of water in the event of a diminution of supply or failure of supply?

A. All of the leases have a clause stating that the Government will not furnish them any water—will not furnish water to anybody and if they get water they get it by their own efforts.

All of the leases—pardon me, except one. That one lease in which the irrigation system itself of Stuart Mesa is leased.

Q. And does that lessee in turn redistribute the water to other farmers?

A. That is correct. He leases the system and redistributes the water.

Q. Have you ever been obliged to cut off water because of failure of supply? A. Yes, sir.

Q. Mr. Taylor, do you recall the winter of 1951-52? A. Yes, I do.

Q. In the camp? [598] A. Yes, I do.



(Testimony of William D. Taylor.)

Q. By what climatic feature was that characterized?

A. We had some high water in the river.

Q. What about rain?

A. The rainfall was somewhere in the neighborhood of double the normal rainfall.

Q. What was the effect of that kind of weather on the valley of the Santa Margarita?

A. Well, do you mean the channel, commander, or the valley?

Q. The whole valley.

A. Well, the vegetation, the desirable vegetation increased a great deal. And I believe I could go a step further and say much of the undesirable vegetation decreased.

Q. Does that occasion any thought in your mind of a distinction between annuals and perennials?

A. Well, that was primarily what I had in mind.

Q. Could you explain that for us briefly?

A. When there is sufficient moisture the perennials will actually do quite well in that valley without irrigation. When the water table drops and we have a series of dry years the foxtails and other undesirable vegetation, which can make its growth all in a very short time, will come in and crowd out the perennials which don't do so well in those seasons.

Q. Do you know who all your tenants are, Mr. Taylor? [599]

A. Yes, I do.

Q. Is the State of California one of them?

A. Yes.

(Testimony of William D. Taylor.)

Q. What is the nature of its tenancy?

A. The State of California leases in the neighborhood of 250 acres of irrigable land on the South Mesa for the purpose of raising potatoes in the winter time.

It is a potato seed certification program in which seed potatoes from all over the country, every potato growing state in the country and two or three provinces in Canada and Alaska are tested during the winter months for virus diseases.

The Court: Is that an experimental station?

The Witness: That is right, sir.

Q. (By Mr. Shryock): Can you identify any particular reason why an experimental station of that nature should be located on a property like Camp Pendleton?

A. Purely because of the temperate climate.

Q. And what is the distinguishing feature of that?

A. Well, it is warm enough there so that potatoes will grow during mid-winter and they gain a year in their testing. Last summer's seed crop can be tested during the winter so that they will have the results for the following summer. They don't lose a year in their potato growth—in their seed growth.

The Court: How long has that project been there? [600 ]

The Witness: Just about five years.

The Court: Since the Government occupancy?

The Witness: That is right.

(Testimony of William D. Taylor.)

Q. (By Mr. Shryock): Are they inside or outside of the watershed, Mr. Taylor?

A. Partly in and partly out.

Q. Do they use Camp Pendleton water?

A. Yes, they do.

Q. Where does it come from?

A. The same Ysidora basin.

Q. How frequently is frost experienced on land such as the experimental station is on?

A. Not at all to my knowledge.

Q. Is that one of the advantages of that land?

A. It certainly is. It is very essential in the case of potatoes.

Q. Mr. Taylor, in co-operating with your tenants do you make any attempts to conserve water or the use of water?

A. I am making constant attempts to conserve water.

Q. Are tenants permitted to have as much water as they consider they need for irrigating the land which you have leased to them?

A. They are not.

Q. How do you handle that

A. We allocate water on the basis of total acreage [601] leased to the individual tenant. Would you like me to give the proportion that we allocate, Commander?

Q. Briefly.

A. We have a sort of a sliding scale. A man leasing 100 acres is allowed to use 100 acre-feet of water in a year. A man leasing more than 100

(Testimony of William D. Taylor.)

acres he gets one acre-foot per acre for the first hundred and 75 hundredths of a foot per acre—an acre-foot per year for the next hundred acres under lease and a half an acre foot per acre for the third 100. [602]

The Court: What do you do, apply the law of diminishing returns?

The Witness: We try to protect the small tenants, your Honor.

The Court: I see.

The Witness: We have no tenant over 300 acres, so that is the limit of our allocation.

Q. (By Mr. Shryock): Does he get as much water as he wants? A. No, sir.

Q. Do you make any limitations on how much acreage they may use that water upon, once they have their amount determined?

A. None whatsoever. That was the system that was there when I came, and it wasn't conserving water quite as well as I thought it should, and we changed to this other system.

Q. And with what result?

A. I believe the use of irrigation water on Stuart and South Coast Mesas is about as efficient as I have ever witnessed.

The Court: You said you do not encourage large farming. What is the largest unit you have?

The Witness: Well, of the truck farmers, we have one that runs about 320 acres, but it isn't in the Santa [603] Margarita watershed.



(Testimony of William D. Taylor.)

The Court: I see.

The Witness: That is, it does not derive water from the watershed.

The Court: I see.

The Witness: We have larger dry-farming areas leased.

Q. (By Mr. Shryock): Mr. Taylor, does the area known as South Coast Mesa receive irrigation water? A. Yes, it does.

Q. Was it doing so when you arrived at the camp? A. Yes, sir.

Q. Has that been continuous since?

A. Yes, sir.

Q. Do you have any idea how many acres of South Coast Mesa lie outside the watershed?

A. About 450.

Mr. Shryock: Cross-examine.

Cross Examination

Q. (By Mr. Dennis): Mr. Taylor, what is the average rainfall in this area?

A. Well, that varies rather markedly in rather short distances. Do you mean——

Q. In the Santa Margarita watershed.

A. In the Santa Margarita watershed on Camp Pendleton, [604] approximately twelve.

Q. What is it above Camp Pendleton in the Santa Margarita watershed?

A. I don't know.

Q. How much rainfall did you receive for the water-year October 1, 1941—starting October 1, 1951?

(Testimony of William D. Taylor.)

A. I couldn't tell you exactly, but it runs in my memory that it was in the neighborhood of 22.

Mr. Shryock: May I respectfully suggest that we are having a little bit of difficulty in hearing you, Mr. Dennis.

Mr. Dennis: The reporter had said she had difficulty in hearing me before. I will move back here. I wonder if we can move this map back, so that I may get back here.

The Court: If you want to sit nearer the witness, why don't you sit on the opposite side of Commander Shryock? With certain witnesses, you know, sometimes you have to go to the end of the courtroom and have the witness talk to you so that the witness can be heard. Witnesses arrange their voices, and I think they do it unconsciously, so that they direct their voices to the person they are talking to and do not realize a lot of other people in the courtroom have to hear everything that is going on.

Q. (By Mr. Dennis): Now, Mr. Taylor, when you said you had approximately 5,500 acres of land under lease at the present time, is all of that land located within the watershed [605] of the Santa Margarita River? A. No, sir.

Q. Is there a part of it located in the San Mateo watershed? A. Yes, there is.

Q. How many acres in the San Mateo watershed?

A. In the neighborhood of eight to nine hundred.

(Testimony of William D. Taylor.)

Q. And is part in the watershed of the San Onofre?      A. Yes, it is.

Q. Approximately how many acres?

A. Well, that is difficult to say, because that is all under one lease, but not all in the watershed. I can only estimate. Probably in the neighborhood of 400 acres, three to four hundred.

Q. And have you acreage in the watershed of Las Flores Canyon?

A. Yes, we have.

Q. Approximately how many acres in Las Flores Canyon?

A. Somewhere in the neighborhood of 300.

Q. That acreage is not supplied with water from the Santa Margarita River?      A. No, sir.

Q. Now, is some of the acreage you have under lease dry-farmed?      A. Yes, it is. [606]

Q. Are you familiar with what is known as Chappo or Middle Basin?

A. Approximately.

Q. Have you any acreage that is under lease for agricultural purposes that overlies Chappo basin?      A. No, we haven't.

Q. Are you familiar with O'Neill basin?

A. May I restate that? Not under lease. We graze Chappo under permit.

Q. Now, how many acres are under permit at Chappo? You say "graze"?      A. Graze.

Q. Oh, graze. I beg your pardon.

A. Yes.

(Testimony of William D. Taylor.)

Q. Is any portion of O'Neill basin or Upper basin leased for agricultural purposes?

A. No, sir.

Q. Is there any land that is above, upstream from O'Neill or Upper basin, that is leased for agricultural purposes?

A. No, sir.

Q. Now, your grazing leases or permits apply to large acreages?

A. That is right.

Q. Are there any permits which limit the grazing [607] privileges to the watershed of the Santa Margarita River?

A. No, there are not.

Q. The sheep, 15,000 or 20,000 head of sheep, which you referred to, would be grazed on the entire range of the 123,000 acres?

A. That is correct.

Q. Would the same apply to the cattle?

A. It is a little different with cattle, because they have to be fenced, and we have to say exactly where they are going in order to implement the fencing.

Q. Are they confined to premises on the United States Naval Ammunition Depot?

A. No, we have cattle on Camp Pendleton also.

Q. Does the 1,000 head apply to cattle on both the United States Naval Ammunition Depot and Camp Pendleton?

A. No, sir. That is exclusive to Camp Pendleton.

Q. Exclusive of the Naval Ammunition Depot?

A. No, sir, to Camp Pendleton. My 1,000 head that I mentioned is exclusive to Camp Pendleton.



(Testimony of William D. Taylor.)

I have nothing to do with the Naval Ammunition Depot.

Q. You have nothing to do with the Naval Ammunition Depot?      A. That is right.

Q. So that the 1,000 head would be cattle that grazed on Camp Pendleton? [608]

A. That is correct.

Q. And are those cattle——

The Court: These cattle belong also to private individuals?

The Witness: That is correct, sir.

The Court: And you make leases with them and allow them to graze there?

The Witness: That is right.

Q. (By Mr. Dennis): Those cattle are only run on the reservation during the wet season of the year? In other words, that the permittee is required to remove them along in May, or April, or June?

A. No, sir, they are not required to remove them. We have some livestock that remain the year around. They cut way down in the dry months.

Q. Approximately how many head of livestock do you run during the dry season?

A. We have somewhere in the neighborhood of 1,500 sheep units which have grazed for the past two dry seasons, but not prior to that; and, oh, from three to four hundred cattle.

Q. So that the figure of 15,000 or 20,000 sheep and the larger figure for the cattle is the number which you graze during the wet season?

(Testimony of William D. Taylor.)

A. At any one time, but not the year around.

Q. Now, is there any portion of the surface area of Ysidora basin under lease for agricultural purposes?

A. No, sir.

Q. When did you say you arrived at the military reservation? A. November 15, 1948.

Q. And you have been there ever since?

A. That is right, sir.

Q. Now, when was water first cut off because there was a failure of supply?

A. It was never cut off. It was restricted.

Q. It was restricted. When was that?

A. In the spring of 1949, the first that I had anything to do with, and I can't testify as to previous regulation.

Q. Now, was there any occasion other than the spring of 1949 when water was cut off?

A. It has been cut off or restricted continuously since then.

Q. Now, that is restricted to the amount that you specified in your lease, of one acre-foot up to 100 acres, and so forth? A. Yes, sir.

Q. There has been no time since you have been on the reservation when the tenants have not been able to secure the [610] amount of water to which they were entitled under their lease?

A. Would you repeat that, please?

Q. I say, at no time since you have been employed as ranch manager have the tenants been restricted to less water than that to which they are

(Testimony of William D. Taylor.)

entitled under and pursuant to the terms of their lease?

A. That is correct, because the terms of their lease don't promise them any water.

Q. In other words, when they make their lease for farming purposes, they haven't the right to demand any water at any time?

A. That is correct.

Q. Now, do you make a charge, then, for the water which you furnish them, in addition to the rental which they pay under the lease?

A. A charge is made.

Q. Is the tenant at the time that they lease the property given the understanding that they will have the right to receive one acre-foot per acre up to 100 acres of land that is in the lease?

A. That is right.

Q. They are given to understand that they will have the right?           A. That is correct. [611]

Q. And at no time since you have been camp manager have you denied any tenant the right to that amount of water?

The Court: Except in restricted periods.

Mr. Dennis: That is what I mean.

Q. Up to that amount?

A. That is right.

Mr. Dennis: I think that is all.

Mr. Shryock: Mr. Grover?

Mr. Grover: No questions.

The Court: Have you any redirect?

Mr. Shryock: No, sir. Thank you very much.

(Testimony of William D. Taylor.)

The Court: All right, Mr. Taylor.

(Witness excused.)

The Court: Is your next witness a long witness or a short one? I am just asking the question because I wanted to know whether to have a recess now or later.

Mr. Shryock: A short one, sir.

The Court: All right. Then we can go on.

Mr. Shryock: Mr. McNearny, please.

### JOSEPH R. McNEARNY

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

#### Direct Examination

The Clerk: What is your name, please?

The Witness: Joseph R. McNearney, M-c-N-e-a-r-n-y. [612]

Mr. Dennis: I couldn't get your name.

The Witness: McNearney, M-c-N-e-a-r-n-y.

Q. (By Mr. Shryock): What is your residence, Mr. McNearny?

A. 1916 South Freeman Street, Oceanside.

Q. California?            A. California.

Q. What is your occupation?

A. Civilian in charge of pipe and plumbing at Camp Pendleton.

Q. When did you first become connected with Camp Pendleton?            A. October, 1942.

Q. Was that about at the time of the acquisition of that property by the United States?



(Testimony of Joseph R. McNearny.)

A. Shortly after.

Q. In what capacity did you become connected with the camp?

A. Officer in charge of pipe and plumbing. At that time I was in the Marine Corps.

Q. In military service? A. Yes, sir.

Q. On active duty? A. On active duty.

Q. When did you return to inactive duty? [613]

A. In 1946.

Q. Since October of 1942 have you been continuously employed at Camp Pendleton?

A. With the exception of a short trip I made to Saipan, I was there continuously.

Q. How many months was that?

A. Nine months.

Q. During the nine years from 1942, with what part of the camp's operation have you been principally connected?

A. The maintenance and operation of the pumps and the water system at Camp Pendleton.

Q. The water-distribution system?

A. Yes, sir.

Q. Mr. McNearny, I show you Plaintiff's Exhibit 22, with particular reference to the Ocean-side sheets and the Fallbrook sheets, and I ask you whether or not the essential features of the water-distribution system are depicted on that exhibit.

A. Yes. The pumps are in here (indicating), and the water system is here, and your reservoirs are up in here (indicating.) [614]

Q. And by that you are pointing to certain

(Testimony of Joseph R. McNearny.)

lines and I might call your attention to the fact that this map does bear a basic legend, does it not?

A. Yes, sir.

Q. Pipeline?

A. Pipeline, irrigation system and watershed boundaries.

Q. Sewage lines?

A. Sewage lines. Everything is noted.

Q. Every essential — water and sewage. Now, does that reflect—I will withdraw that.

A. This is all the same as when I first came there.

Q. That was the question I wanted to ask you, whether or not after the camp got into operation the distribution system was substantially as it is represented today?      A. Yes, sir, it still is.

Q. And has that distribution system with the exception of changes or substitutions in things like pipe——      A. Yes.

Q. Remained substantially the same throughout the operation of the camp?

A. It has remained the same.

The Court: How did you happen to be assigned to this duty? Did you specialize in that type of work?

The Witness: Yes.

The Court: In civilian life? [615]

The Witness: Yes, sir; my work has been construction all my life.

The Court: All right.

Q. (By Mr. Shryock): Now, have you noted on

(Testimony of Joseph R. McNearny.)

Exhibit 22, Mr. McNearny, the outlines of the watershed of the Santa Margarita River?

A. Yes, I did notice it.

Q. Is any of the water in the camp system carried outside of the watershed by the distribution system?

A. Yes, practically all of it. 11, 12, 13, 14, 15, 16 areas are all outside the watershed.

Q. And are those areas designated on the exhibit by the digits you have just recited?

A. Yes, sir.

Q. Well, is that true then, essentially, throughout the nine years that the camp has been in operation?

A. It is exactly the same as it was when I came here.

Q. Where does the water in that distribution system come from?

A. It comes from the deep wells in the Santa Margarita.

Q. Pumped from the underground basin?

A. Yes, sir.

Q. What can you say about the supply of Camp Del Mar?

A. What does the Commander mean, "Supply of Camp Del Mar"? [616]

Q. Is Camp Del Mar supplied by the camp water distribution system?

A. Oh, yes, sir, that is pumped from Ysidora.

Q. And is that shown on the Oceanside sheet?

A. Yes, sir, it is shown on this sheet here.

(Testimony of Joseph R. McNearny.)

Q. On the Oceanside sheet?

A. Yes, that is correct.

Q. Now indicate where on the map Camp Del Mar is located?

A. This vicinity in through here.

Q. And by that you are indicating an area immediately adjacent to the ocean and inside what are shown to be the boundaries of the watershed?

A. Part of it is inside and part of it is outside.

Q. In other words, all of the area that I am indicating here in block No. 6374?

A. Would be outside.

Q. Outside the watershed?

A. That is correct.

Q. And is that on the distribution system which obtains its water from the Ysidora Basin?

A. That is correct.

Q. Pumps? A. Yes.

Q. Mr. McNearny, has the use of water through that distribution from the time it was put in operation continued [617] without interruption?

A. Yes, sir.

Q. Are you familiar with Lake O'Neill on the camp property?

A. Well, if you mean familiar with it — we operate it.

Q. Then you must be familiar with it?

A. Yes, sir.

Q. Do you recall any occasions in the past four



(Testimony of Joseph R. McNearny.)

years, let us say, in which Lake O'Neill has been dumped?

A. Yes, sir, twice at least in the four years.

Q. It has been dumped twice in four years?

A. Yes.

The Court: Do you mean emptied?

The Witness: Emptied.

Q. (By Mr. Shryock): And what was the purpose of that operation?

A. To replenish the basin.

Q. And in what way does emptying the lake accomplish that?

A. It flows right from the channel right down into the vicinity of where our pumps are located in the Santa Margarita Basin.

Q. And would the water therefore be released in what is known as the O'Neill or upper basin when it comes out of the lake? [618]

A. Well, it comes directly out of—well, as they now call the lake O'Neill, right on into the Santa Margarita River.

Q. But that is right in the vicinity of the lake?

A. That is the lake.

Q. Have you any control apparatus for the operation of emptying the lake?

A. Yes, sir. We have a valve at the low point of the lake and culverts running from that valve out to the channel to put it directly into the Santa Margarita River.

Q. So that you can control the release of water?

A. We can put out an inch of water, four feet of

(Testimony of Joseph R. McNearny.)

water. The valve is, as I remember—it has been a long time since I got a look at it, but it is about 24 inches, 24 to 36 inches and up to three feet we can control any amount of water going out of that culvert.

Q. And the manner of controlling water in Lake O'Neill is a part of the department you are connected with, is it?      A. Yes, sir.

Q. What is that department, exactly, Mr. McNearny?      A. Water and sewage.

Q. And is that under the Camp Public Works office?

A. That is the post maintenance office. That is the Marine section.

Q. Mr. McNearny, are you familiar with the so-called [619] O'Neill ditch?

A. Yes, sir, the one running adjacent to the Margarita and the lake, yes, sir.

Q. Can you state whether any water diverted from the Santa Margarita River into the O'Neill ditch must necessarily go into Lake O'Neill?

A. That is not true. It can continue on directly down into the Santa Margarita by by-passing the Lake O'Neill. To get it into Lake O'Neill through that ditch you would have to put a series of baffles and then open a valve to get it into Lake O'Neill.

Q. And if those artificial means were not used it would continue on past the lake and over into the basin?

A. That is correct.

Mr. Shryock: Cross examine.

(Testimony of Joseph R. McNearny.)

Cross Examination

Q. (By Mr. Dennis): Now, I think you testified on two occasions during the last four years you had emptied Lake O'Neill by releasing water through a valve, is that correct?

A. That is correct, yes, sir.

Q. Could you give us the dates on which you emptied Lake O'Neill?

A. Well, to give you the dates no, but I could check my records in the office. But in 1950 and 1949 I know of those [620] two years—not dates.

Q. Now, do you remember the month, approximately? Was it in the winter?

A. It was just before the winter hit, before the rains hit.

Q. In other words you emptied the lake just before you anticipated there would be a substantial increase in the flow of the Santa Margarita River?

A. We opened them to help the basin and at that the same time knowing that we were picking up the surplus that was coming down the canyon into the lake.

Q. You say to help the basin. Do you recall what your lift was in these various wells at that time?

A. No, sir.

Q. Do you know what the levels were, static water levels in the wells?

A. My records show them, I believe. I believe they are on exhibit here but I wouldn't be able to give you the figures, no.

Q. Did you maintain records of the static water

(Testimony of Joseph R. McNearny.)

water. The valve is, as I remember—it has been a long time since I got a look at it, but it is about 24 inches, 24 to 36 inches and up to three feet we can control any amount of water going out of that culvert.

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Q. Now, do you remember the month, approximately? Was it in the winter?

A. It was just before the winter hit, before the rains hit.

Q. In other words you emptied the lake just before you anticipated there would be a substantial increase in the flow of the Santa Margarita River?

A. We opened them to help the basin and at that the same time knowing that we were picking up the surplus that was coming down the canyon into the lake.

Q. You say to help the basin. Do you recall what your lift was in these various wells at that time?

A. No, sir.

Q. Do you know what the levels were, static water levels in the wells?

A. My records show them, I believe. I believe they are on exhibit here but I wouldn't be able to give you the figures, no.

Q. Did you maintain records of the static water

(Testimony of Joseph R. McNearny.)

table and the drawdown water tables in the various wells during the year 1949 and 1950?

A. From 1947, February 1947.

Q. What wells did you maintain records on?

A. C.B-1, 11-F, 11-X, 11-D. [621]

Q. Not quite so fast.

A. CB-1, 11-F, 11-X, 11-D.

Q. That is in the Upper Basin? A. Yes.

Q. You maintained readings in any of the other wells? A. Yes, in the Ysidora.

Q. Chappo?

A. When you say Chappo you have Chappo there.

Q. This is the upper——

A. We have been referring to that——

Q. When we referred to Chappo we meant that as Middle and O'Neill is the Upper.

A. Well, there aren't any pumps in the alleged Upper Basin.

Q. How often did you take those readings?

A. We have them at least every month throughout the year.

Q. And where are those records maintained? In the post maintenance office?

A. In the post maintenance office, yes.

Q. And would you also have the records in the post maintenance office as to the time when you released the water from Lake O'Neill.

A. Yes, sir; and also the record of how long it took and how many inches each day that came back into the lake. [622]

(Testimony of Joseph R. McNearny.)

Q. Now, did you ever run short of water at Camp Pendleton?

Q. What do you mean by "run short"?

Q. Were there any times where you had to curtail the use of water because you couldn't produce enough from your wells?           A. Yes, sir.

Q. When you couldn't produce enough water from your wells to supply the camp?

A. Well, when you say "produce enough water from the wells"—I went there in 1942 and some of our wells were producing 1400 gallons a minute and at the last checks those that were producing 1400 gallons a minute dropped to 800 gallons a minute.

Now, that can be due to sand. It can be due to the cutting of the bowls and it also can be due to the insufficient amount of water.

Q. Did you make any investigation to determine what the reduction in gallonage was due to?

A. Yes. We pulled several of the pumps and we found in several instances the static table dropped. And in another place we found that we were pumping sand, so there isn't any way of putting your finger on it and saying this is the case.

The Court: Unless you pull the pipe in most of them.

The Witness: That is correct, sir. [623]

Q. (By Mr. Dennis): You can measure the static water table, can you not, without pulling the pump?

A. Oh, yes, surely. You have an air line going down there that will indicate where it is.

(Testimony of Joseph R. McNearny.)

Q. And it is considerably easier to drop a tape down?

A. Yes, sir.

Q. Now, you had no supervision over the water distribution in the Naval Ammunition Depot?

A. No, sir.

Q. That is out of your jurisdiction?

A. Yes, sir.

Q. Now, I think you stated that you had noted the limits of the watershed of the Santa Margarita River on this map. By that you didn't mean that you had placed the lines which designated the boundary?

A. No, sir, only I noted it there.

Q. By observation is what you meant?

A. Yes, that is right.

Q. In other words, you didn't place any lines on this map yourself?      A. Nothing whatsoever.

Mr. Dennis: I think that is all.

The Court: All right.

Mr. Grover: No questions.

Mr. Shryock: Thank you very much, Mr. McNearny. [624]

Mr. Dennis: Could we have a short recess, your Honor?

The Court: Yes, we will take a short recess.

(Short recess.) [625]

The Court: You may proceed.

Mr. Shryock: Colonel Robertson, please.



ELIOTT B. ROBERTSON

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your name, please?

The Witness: Elliott B. Robertson. First name spelled E-l-i-o-t-t.

Q. (By Mr. Shryock): And what is your rank, Colonel?

A. Lieutenant colonel, United States Marine Corps.

Q. What is your residence, Colonel?

A. Waldorf, Maryland.

Q. Is that near Washington?

A. About 20 miles out.

Q. Will you describe briefly your educational background, Colonel, beginning with your graduation from high school, and the year?

A. I graduated from high school in Bethesda, Maryland, in 1934. For approximately a year and a half I worked in various construction trades, as I had all my life.

I entered the University of Maryland in the fall of 1935 and graduated with a Bachelor of Science degree in civil engineering in 1939. [626]

Q. Now, following that, what did you do?

A. For a very short period, a matter of weeks, I was on active duty as a second lieutenant in the United States Army, following which I became a

(Testimony of Elliott B. Robertson.)

regular officer in the United States Marine Corps. I went to Philadelphia for approximately ten months of basic training, leaving there in the summer of 1940, and proceeded to Hawaii, at which point I became attached to a ship in the fleet and cruised the Pacific Ocean for about 13 months.

In about July of 1941 I proceeded to San Diego, and was attached to an infantry unit at San Diego and entered Camp Elliott at various times.

In October of that year I was attached to an engineer unit, an engineer battallion, and proceeded to Pearl Harbor as a company commander of engineers. At that place we spent seven or eight months building Camp Catlin — C-a-t-l-i-n — and my job there——

The Court: Colonel, the previous witnesses, because we are roaming all over the United States, have formed the custom of spelling out names, so if you will help us along that line, it is very helpful to the reporters.

The Witness: Yes, sir. I had approximately one-third of the camp assigned to me for construction under my personal direction, and we built some 250 buildings of all types, mess hall, barracks, bakery, and so on. [627]

Q. (By Mr. Shryock): Since 1939, Colonel, have you been on continuous active duty as a regular Marine Corps officer? A. I have.

Q. Where were you on the day of 7 December 1941?

A. Well, there is one little gap yet. I am sorry.

(Testimony of Elliott B. Robertson.)

There is not. I was at Pearl Harbor in the Navy Yard.

Q. Following that, what was the character of your duty during the war years, the combat years?

A. I have just described the first few months, when we were building this camp. Our unit returned to the United States to join the 2nd Marine Division, of which we were a part. I was separated, and ordered to Washington, D.C., where for a short while I was assistant, and then officer in charge of the planning, procurement and supply of combat engineer equipment for the Marine Corps.

Q. How long were you in the Washington assignment?      A. 28 months.

Q. Then what followed that?

A. In November of 1944 I proceeded to Guadalcanal, where, in the capacity of battalion commander, I formed the 6th Engineer Battalion, which is part of the 6th Marine Division, which also formed at that place.

We were there for five or six months, training, and building roads and bridges, and providing all of the [628] housekeeping necessities for the division, their water, and so on, following which we went to Okinawa and engaged in combat.

At Okinawa I was the division engineer for the 6th Marine Division, and for a few days of combat I had a naval construction battalion under my direction, plus my own engineer battalion, plus the 6th Pioneer Battalion. After the Seabees were left to construct an air field which I had started, I

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retained the company and the pioneer battalion under my direction.

Q. Was your unit engaged in actual combat?

A. We were.

Q. On Okinawa? A. Yes.

Q. Did those combat activities result in any personal effects on yourself?

A. I was wounded twice at Okinawa. The second wound resulted in about nine months of hospitalization.

Q. Were you sent back to the United States for that hospitalization?

A. I was sent back almost immediately, for my hospitalization at Bethesda, Maryland.

Q. How long were you there? Approximately nine months, you say?

A. About nine months elapsed time, and I entered [629] Bethesda, Maryland, the 6 July 1945 and departed 11 February 1946.

Q. In February, 1946, then, were you discharged from the hospital and returned to active duty?

A. I was.

Q. And what assignment did you take up at that time?

A. I was ordered to headquarters of the Marine Corps again, and assigned to a billet as assistant head of utilities and public works section of the supply department of the headquarters. [630]

The Court: Where was that?

The Witness: Washington, D.C.

Mr. Shryock: Colonel, will you say whether or



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not you received any award as a result of your activities on Okinawa?

A. I got the usual merit badge for each wound and received the Silver Star.

Mr. Shryock: I assume that the court is aware that the Silver Star is one of the highest military decorations there is and is a statutory one.

The Court: That is right.

Q. (By Mr. Shryock): The award of the Silver Star requires a personal commendation by the head of the department involved, does it not, Colonel?

A. It does.

Q. Now, would you describe in some detail the nature of your duties, beginning with a statement as to the particular characterization of office which you hold in the Marine Corps, following your return to active duty? I am referring to the supply designation.

A. Well, for some time after my return to duty I continued to be classified as an engineering officer, but I am not sure whether it was 1946 or 1947 when I became designated for duty as supply duty. The designation was made by the Secretary of the Navy.

That supply duty classification in the Marine Corps is [631] one separate and apart from all the other officers of the Marine Corps and was established under a specific statute.

Q. Now can you state, Colonel, whether or not since 1948 your duties have been in substantially

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the same area of activity but with increasing responsibility as the years have passed, of course.

A. From 1946, February 1946 to February of 1951 I remained in the same specific job as assistant head of the utilities and public works section. At that time, February of 1951, I relieved my superior and became the head of the utilities and public works section which job I now occupy.

Q. Is that your principal billet, your principal assignment?

A. That is my principal assignment and at the same time I assumed that assignment I assumed the traditional collateral duty which accompanies that assignment entitled "Recorder, Marine Corps Station Development Board."

Q. Now, could you tell the court something of the nature of the personnel and function of that board?

A. The Marine Corps Station Development Board is composed of eight of the top generals of the Marine Corps stationed at the headquarters, represented first by the assistant Commandant, a Lieutenant General, then by various other Generals from the various departments, such as the director of aviation, Inspector General, Quartermaster General, the G-1, G-3, G-4 and so on. [632]

The Board duties are to review and keep in constant readiness a current and long-range plan for the development of the posts and stations of the Marine Corps to meet the known requirements. In other words, we determine what the population

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deployment will be—that is what the first Marine Division will be and what it will do and what its strength will be and we inform the station from my office their job.

The station is required at specified times to return a development plan which shows the items which they need to complete their stations, to carry out their assigned tasks.

Q. Now give an example of what you are referring to as a “station.”

A. It is any activity of the Marine Corps such as Camp Pendleton, a Marine Corps recruiting depot, the Marine Corps School at Quantico, the supply office in Georgia, the Marine barracks at Camp Lejeune and so forth.

Q. Now, what are you required to do at and for that board as the recorder?

A. Well, as the recorder I have the simple administrative duty of keeping the records straight, putting the submissions in proper form for the board perusal.

I have been personally and directly charged by the assistant Commandant of the Marine Corps, the present and past one, with the responsibility and duty of looking at [633] each and every station, each and every project; recommending to that board approval, disapproval, modification and its relative merit with regard to other projects which may be submitted by other stations.

Q. And is it your duty to collate and bring

(Testimony of Elliott B. Robertson.)

before the board of eight generals the information upon which they are required to act?

A. That is correct. I briefly describe to them each project, the station's justification for it, my own opinion after examination and my recommendation as to what disposition is made and that is submitted in the form of a priority list—the project considered to be most important at the top and the least important at the bottom.

I do not intend to convey that I personally say yes or no. I am charged with technical advice to the board and from time to time they deem it wise to overrule some of my ideas.

Q. Well, it is at least fair to say, is it not, Colonel, that your personal recommendations carry, let us say, some weight with the board?

A. In that I am the only construction man present.

Q. Now, will you tell the court when in the course of carrying out these duties you first became acquainted with the Marine Corps post known as Camp Pendleton?

A. That dates back to my wartime assignment when in July 1943 it became apparent Camp Pendleton was hampered in [634] activities due to a lack of proper layette—of housekeeping equipment.

I proceeded to Camp Pendleton under orders. I studied the camp and its operation and came to the conclusion that a list of things were needed for the proper operation of the camp, such as shovels—that is to say power shovels, tractors, grass



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cutting equipment, pumps, welders, lighting equipment—practically everything that is required in the maintenance and operation of a Marine Corps post. I then returned to the City of Washington and drew up specifications and purchased the equipment and furnished it. That was my first experience with Pendleton.

Q. And what year was that? A. 1943.

Q. So that your acquaintance with the camp and its operation dates from the very early days of its acquisition by the Navy Department?

A. Yes, sir.

Q. Now, between 1943 and the present time, Colonel, what occasion have you had to acquaint yourself personally with the general operation of Camp Pendleton?

A. Commencing in February of 1946 as the assistant to the job I now hold, I spent a great deal of time in studying all of the records, drawings of Camp Pendleton. That is to say we have a permanent file in my office of the [635] as-built drawings of every structure and its location with relation to all others at every post and station. And when a proposal comes in to raze a building, change its use, erect a new one or alter a structure we examine the records and from our personal knowledge and from an engineering viewpoint pass on the soundness of the project and as I said before, make our recommendations to the Marine Corps station development board.

Then at various times in the interval I have

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visited Camp Pendleton in varying frequencies and examined the various structures and operations going on thereat until the current year, when I probably spent upwards of a third or better of my time at Camp Pendleton.

Q. Actually on the scene personally?

A. That is correct.

Q. Does your particular assignment require a frequent inspection, personal inspection of the posts and stations of the Marine Corps?

A. It does.

Q. And in addition to that requires your personal analysis of the data and material sent in by the stations and posts to your office in Washington?

A. That is correct. I do not make all of the inspections myself. I have certain experts in my office and some of the inspections are made by myself and some are made by [636] them and their written reports are studied by me and their oral information.

Q. How large is your office from a personnel standpoint?

A. I have approximately 60 people.

Q. Are some of those civilians?

A. They are officers, enlisted and civilian.

The Court: What building are you located in? The Pentagon?

The Witness: No, sir, we are up the hill in the Arlington Navy Annex. [637]

Q. (By Mr. Shryock): Now, Colonel, what is

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your responsibility to or relationship with the Quartermaster General of the Marine Corps?

A. The Quartermaster General of the Marine Corps has his establishment divided into three parts: one, a disbursing part, which pays the troops; one, an administrative part, that administers his office; and the other, the so-called supply branch, which is actually the operating force that he has, and I am in utilities and public works section of that branch, which is one of the principal seven subdivisions of his department.

Between the Quartermaster General of the Marine Corps and myself lies the executive officer and the brigadier general, who in matters pertaining to supply takes direct and personal cognizance. In matters pertaining to construction and development, I have direct access to the Quartermaster General.

Q. You have a direct responsibility to him in those matters?

A. That is correct.

Q. Colonel, can you tell us what relative importance the post known as Camp Pendleton enjoys in the over-all organization of the Marine Corps?

Mr. Dennis: I believe that I will object to that. I don't believe that the necessity for the use of water has [638] anything to do with the riparian rights of the parties.

Mr. Shryock: Now, the purpose of the question is simply to show whether or not Camp Pendleton is an important component of the Marine Corps.

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It seems to me that that is most relevant, because if it is a relatively unimportant component, then perhaps our concern has been misplaced in this particular case. I think it is of great interest.

The Court: In order to determine beneficial use, whether we are speaking of the Marine Corps or anything else, you have to set it in proper perspective. I have already decided that I consider a military use to be a proper riparian use.

Mr. Shryock: Yes, sir.

The Court: And that decision was reached at the suggestion of counsel made in advance of trial, that after the pre-trial certain questions which you gentlemen selected should be decided in advance as a guide in the conduct of the case.

I may say I am making this statement in the hope there is a newspaper man here—I do not see anyone—so as to avoid the impression that the publication of the pretrial opinion gave in the minds of some lawyer friends of mine, who are not familiar with the procedure, as to how it came about that I decided a lot of important legal questions in advance of trial.

I did it because you gentlemen asked me to. And when I say “you”, I mean all of you, and you collaborated with me [639] by writing four briefs. The Government wrote one, the State another, Mr. Dennis another, and Mr. Swing another.

And I think at the present time, as I see how smoothly things are running, you were right in suggesting that we do that, because it was your



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suggestion after the pretrial that this should be done. At the time I thought you were just giving me a lot of extra work. I realize now that probably in that manner you have saved a lot of work, not only for myself, but a lot of work for yourselves.

So to get back to the point I am making, in making that ruling there still remains the question of the way in which the water is being put to the particular use and the extent of that case.

You will remember, I think it was Mr. Grover, who, when I gave you a rather brief preview of what my opinion, which was not to come until five or six days afterward, was to contain—I think it was Mr. Grover who said that, even though admitting that theoretically a military use might be a riparian use, the question of the extent of the use is still a question. I agree with him that it is.

I have been rather quiet and haven't said many things about the law, because no occasion has arisen to amplify anything that was said in the opinion, but I thought this was a good occasion to first emphasize, more for the benefit of those present than just for you, as to the whys and whereofs [640] of the pretrial opinion, and then to point to it that in this particular case the particular use is still important.

You will remember the conclusions which I drew, and I wish you knew how many man-hours and night-hours I devoted to that. I will tell you that is the most difficult thing in that opinion. Those three pages of conclusions were rewritten at least

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half a dozen times, and half of them were written at night. I would get up at home, and think of another one, and write it out, because I wanted to make absolutely certain that I did not foreclose a factual right to anyone. And even when I determined the order of proof, I still indicated what each side would be free to prove. With the way the case has proceeded, I realize now that we have laid out the pattern in a manner which will be very beneficial to this entire litigation, not only as to the particular defendants as to whom we are trying the case at the present time.

So, to get back to the ruling, I think it is very important to find out, not only the fact that the camp is there and that the purchase was not only with the implied assent of the State, but as an actual cession of the State, so that, as the Constitution provides, there is no need for an actual cession now, as the cases I cited indicted. There is an actual cession by the State. So that now we should have the picture of the thing.

I don't like the word "picture," but there is a German [641] word that explains it better than anything else. It is "gestalt," g-e-s-t-a-l-t. They have even got what they call a gestalt psychology, and that is where you have to take several elements, not merely the object and the subject, but many, many elements, in order to consider a situation, to envisage it as a whole, and there is no equivalent word in the English language. The word "picture," as used in the ordinary sense, is about the nearest

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word I know of. So you will note how an American vulgarism, or a slang word, may supply the lack of a scientific word, such as the German word "gestalt."

So it is still necessary to see Camp Pendleton, not only as a particular establishment at the particular place, but its relation to the entire military establishment of which it is a part. That is why I think this inquiry, if it is not pursued too far, is material.

Mr. Shryock: Thank you, sir. And I will state that we shall endeavor to simplify it and to address ourselves to the particular matter of the long-range plans for Camp Pendleton, because I believe that no one will dispute the fact that prospective use, as well as present use, is a relevant factor.

Mr. Dennis: I want to make the grounds of my objection clear, your Honor, and that is, that the riparian rights of the United States in and to the waters of the Santa Margarita can be neither enlarged nor limited by the importance of Camp [642] Pendleton to the other military establishments maintained by the Marine Corps in the United States.

Mr. Shryock: Well, suppose you answer that one question as to its relative importance, as it has been determined, and then we will address ourselves to present use and long-range plans.

The Witness: To answer the question——

The Court: Just a minute. I want to say this: that that might be correct as an abstract proposi-

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tion, but when we read the late decisions of the Supreme Court of California, particularly I think it is the Hoberg case, and when they say that in determining whether it is a resort and the use of water which guests may make, which by strict common law would not be considered riparian rights—in determining that you have a right to consider all of the modern things that a man should have a right to do, then I think those late cases abandon entirely the old cases.

We had a man here who is a great believer in riparian rights, and who succeeded for many years, because of the influence of his name—his name was Weil—of holding down the riparian rights to strict common law, but there isn't a present writer anywhere in the country, and I have given you the Law Review writers, all of them that have come to my knowledge, from my friend Delgatrovich in San Francisco, to some of the other writers, who say that since the Weil [643] influence, the baneful influence, asserted itself, that now riparian rights must be understood in the light of an expanding need in a community, and must be applied to an expanding agriculture or to an expanding domestic use.

So it is very important in these matters, and if Camp Pendleton were owned by some hotel or resort operator, I would have a right to go into the matter. Supposing it was one of the Hilton chain and they were establishing a resort there. It would be proper to consider the relationship of



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that to the other. Suppose they used it for their overflow guests. Then I would have to consider whether that was too much of a burden. Otherwise I will be back to that very unfortunate phase that somebody who wrote the brief for the Government used—or, not the Government, but the State, where they said that, of course, a few soldiers patrolling the river would be all right, as though the Government of the United States bought that ranch and spent millions of dollars in order to have a patrol there. Against whom would they patrol? There are no enemies threatening that portion of the Santa Margarita, so that it would have to be patrolled.

So we have to be realistic in applying these old concepts that we borrow from the common law to the new conditions. So I believe that the relationship of this to the needs of the Government of the United States, which bought these, you see, is very important, because the State has the [644] ownership of the water which the others use only as a usufruct, whether they are appropriators or others, and is an interested party, and, therefore, its relationship to the matter, the relationship of this governmental activity to the others, is of grave importance.

The best proof of this, is when the opinion was released, I said something to the effect that I was surprised that the State of California should take the view that the Government could be induced to buy a ranch here only to find then it had no right to use the water for that purpose, because it was

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the contention of the defendant that a military use was not a riparian use. I have already ruled against that, and no power on earth is going to move me from that position. [645]

That is not going to be reargued again because I didn't waste days and days of work to reach that conclusion only to have it reargued.

What we are talking about is merely the meaning of the ruling and the lack of the evidence.

Immediately we had denials on the front page of the Times from some of the Congressmen, like Congressman Yorty and others, who interested themselves in this McKinnon bill which so far as I am concerned could well pass because it wouldn't settle, as Mr. Dennis said, it wouldn't settle this controversy as to the defendants. It would settle the controversy only as to one defendant and that is the Fallbrook Irrigation District.

But immediately after this statement there came denials.

"Of course we don't want the camp to go away. Of course we want the camp here. We have no such intention. All we want is merely to see that everybody has water."

We can't live in an abstraction. We can't decide lawsuits in a vacuum. This is my 26th year as a judge in this community and I found that you can't decide any question in a vacuum. Law arises out of the need of the community and you have got to apply the law to a particular situation and in

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order to understand it you have to understand the entire situation.

I am not going to permit the Colonel to testify about [646] the strategic value and all that, but certainly its relationship and whether it is an important link in a chain of establishments in the Marine Corps is a part of the case and a necessary part in order for me to determine whether there is beneficial use and the quantum of use.

You will remember I have left open the point as to the amount of the use and the reasonableness of it. It is still a question of fact.

Mr. Shryock: All right.

Mr. Dennis: If your Honor please, I don't believe that your Honor would take the position that if the Biltmore Hotel Company was the plaintiff in this action or the General Motors Corporation had decided to move a hotel or a factory into the Santa Margarita Watershed, that the extent of the use or the quantity of water to which they were entitled to put to beneficial use, could in any way be influenced by the fact that General Motors thought this was going to be one of their principal units, or that the Biltmore Hotel thought this was going to be one of their principal units.

Now, my objection only goes to this, that the fact that Camp Pendleton may have an important part in the future planning of the Marine Corps can neither enlarge nor restrict the rights which they have in and to the waters of the Santa Margarita River and that it cannot change the quantity of

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the water to which the Marine Corps is entitled. Nor can it change the place of use to which the Marine Corps can place the water under the laws of the State of California.

The Court: Nevertheless the Supreme Court of California has said that another riparian owner does not have the right to say to you to grow this instead of that and they did it in the Rice case.

Mr. Dennis: I agree with your Honor.

The Court: In the Rice case they said: "You can't tell me to put in alfalfa there because rice takes too long." And you can't tell the Government the use to which they will put the water.

Mr. Dennis: Your Honor, I am making no contention that if the plaintiff can put these waters to beneficial use on its riparian lands that we can restrict the nature of the use to which they are putting the water or the quantity of the water.

The only thing that we are asking this court to do is to say that if they put this water to beneficial use that it shall be determined on the basis of their military use or the basis of the agriculture use to which they are actually putting the water or are protecting their prospective rights.

The Court: That is what they have done——

Mr. Shryock: That is our precise point.

The Court: The constitutional amendment of 1928 took [648] care of that and the constitutional amendment said it is not only the actual use but the prospective use and what they have done here is translate that. That is why I asked those ques-



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tions yesterday of Major Bowen. He has figured the highest actual and prospective use and then translated those into a substitute use, military use and I asked specifically: "You claim for your military use merely the maximum of the actual and prospective use to which you would be entitled under riparian law," and his answer was "Yes."

I don't think you and I disagree on that.

Mr. Dennis: Maybe I misunderstood your Honor, but I should make myself clear in this respect.

If reasonable use for military purposes should be 125 gallons per man per day, the same way in which we measure it for domestic use in the state, and they only have, we will say, 500 men on the reservation, we do not believe that that allows them to prove a prospective use for agricultural purposes which could very well be 100,000 acre-feet per year and then divert that water to the watershed or to actually waste it and supply maybe each man on the reservation with 100 acre-feet per day.

In other words, their actual use is that use to which they can reasonably put the water at that time and if they have so many men and whatever your Honor feels is a usual [649] and a reasonable duty of water for the number of men which they have in the installation, either actually present physically there, that water which they have is a riparian use under your Honor's decision and is prior to any right which we might have by appropriation.

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However, as to the prospective use, so long as they have no use for that water—I mean if today they can put only 5,000 acre-feet of water to beneficial use on the reservation within the boundaries of the Santa Margarita watershed and there are 500,000 acre-feet going down the river at that time, anything over and above the 5,000 acre-feet which they are using, is surplus water and subject to appropriation.

The Court: Temporarily you are taking only one side of the question. You are taking only the actual use.

It is true that between the time—and in my opinion it makes it clear and while that opinion has only 30 pages it is one of the briefest opinions covering as many questions as I have ever written.

It is true that in determining actual use and prospective use a situation may arise where, between the time of the actual use and the prospective use, a surplus arises which you would be entitled to appropriate temporarily.

Mr. Dennis: That is our position exactly.

The Court: Then I agree with you. Then the question becomes a question of fact—how much of this substituted [650] use is the present use, and the prospective use will be envisaged in that light.

But in order to do that I have got to have this entire picture in order to determine the question.

Another thing to bear in mind is this, that if a military use is a riparian use then you cannot con-

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fine that use to the present use measured in agricultural use.

I am not expressing myself very well. Let us put it this way. Supposing that as of today if the water were put entirely to productive use, to agricultural use, you would need only so much water. Then of course there would be a surplus. But if as of today the Marine Corps uses not only what it would use agriculturally actually, but its prospective—what it is prospectively entitled to, then we are entitled to have the facts in the record and then it would be a question for me to determine as to whether the Government has or does not have a right to place the present prospective—to make the prospective use present by the facilities it has there.

I don't know that I have expressed myself well.

Mr. Dennis: That would be a question of reasonableness and then you will have to decide whether the prospective use which they have or expect to develop on the camp would be a reasonable use under our law.

The Court: I don't think we are in disagreement. That is exactly what I said in the opinion. There may be other [651] phases of the law that we will have to discuss after the facts are in and as you know we will discuss them. We will leave plenty of room for oral argument when the case is concluded as to the particular defendants.

I think this discussion is helpful and clarifies the basis of our understanding. I don't think, basically, we are in disagreement. Let us go on.

(Testimony of Eliott B. Robertson.)

Q. (By Mr. Shryock): Do you remember the question?

A. The question was the importance of Camp Pendleton.

The Court: That is right.

Mr. Dennis: Did your Honor overrule my objection?

The Court: I overruled your objection.

The Witness: The best approach is to start with the mission of the Marine Corps and then briefly describe its framework.

The principal mission of the Marine Corps by law is that of being the country's primary and principal amphibious striking force; for the seizing and holding of advance bases. And collaterally to that we are charged by law with the responsibility for the leadership and the developing of tactics and techniques in amphibious warfare for all the services of the country.

The Marine Corps is divided roughly into two halves: The fleet Marine Corps at Atlantic and fleet Marine Corps Pacific. They are striking forces in the named directions. [652]

Those forces are supported on each coast by parallel installation.

The Marine starts at Paris Island on the east coast and San Diego on the west coast in a recruit camp. They go to Camp Lejeune on the east coast and Camp Pendleton on the west coast for advanced infantry and amphibious training.

Some few of them, proportionately, go to the



(Testimony of Elliott B. Robertson.)

Marine Air Stations on the east and west coast which units are trained to support the ground elements.

The whole is backed up by a central school at the Marine Corps school at Quantico, Virginia, by a manufacturing depot in Philadelphia, by reservoir depots in Georgia and Mojave Desert and local depots at Pendleton and Lejeune and by forwarding depots at Norfolk and San Francisco.

Camp Pendleton is an amphibious training base. It is the largest in the world. And although we can't have the advantages of all climates there, it is the most complete in the world, we believe, and when coupled with its satellites for cold weather training, at Pickle Meadows up near Sonora Pass in California, Twenty-Nine Palms out in the desert for desert types of shooting and for desert training, it does comprise the most complete amphibious training base in the world.

Q. (By Mr. Shryock): Is that because it includes shores, mountains, beaches and desert? [653]

A. We have varied terrain of all kinds and we have the ocean and all types of beaches. We have many types of inland terrain and we have the cold weather aspect up in the mountains and the desert aspect at Twenty-Nine Palms.

Q. Is there any portion of the 134,000 acres, Colonel, which you could say that is not adaptable for military training of some kind?

A. There is no part of it that is not adaptable for military training.

(Testimony of Elliott B. Robertson.)

Q. Now, will you state briefly, Colonel——

The Court: How about the portion that at present is being used for grazing and other farming purposes?

The Witness: They are entirely subordinate to the military use. The policy of the Marine Corps is to place as much of the land in cultivation as we can, first, to protect the historic tenants there from a humanitarian standpoint and, to derive whatever income is available to the Government.

Incidentally, our records show that we have had a farming income at Pendleton to the Government which exceeds the original value paid for the ranch and its improvements.

The Court: What is the record, if you know the figures?

The Witness: Something over \$4,000,000. The income to the Government for the fiscal year 1951, I believe, was around a quarter of a million dollars. It has gone as high as a half million dollars.

The Court: Does that go to the general fund of the Government or does it stay with the Marine Corps?

The Witness: It is credited to miscellaneous receipts of the Treasury and is available to no one without an appropriation from Congress.

The Court: It doesn't remain with the Marine Corps in a special appropriation?

The Witness: No, sir.

The Court: It goes into the general fund of the United States Government?

(Testimony of Elliott B. Robertson.)

The Witness: Yes, sir, and the specific name is Miscellaneous Receipts, U.S. Treasury.

The Court: All right.

Q. (By Mr. Shryock): Now, Colonel, will you tell us the occasions on which Camp Pendleton has been designated as a permanent installation of the Marine Corps?

A. That designation is made by the Secretary of the Navy. It was made in 1944 and by reference to my file I can give you the exact date.

Q. You may so refer.

A. It was approved as a permanent Marine Corps establishment by Ralph A. Bard, acting secretary of the Navy, on the 21st of September 1944.

Q. Was there any later official action by the Navy Department reaffirming that designation?

A. That was the final designation as a permanent establishment. It had been established before by the Secretary of the Navy at its inception, but it was not in a permanent category officially until this date and it has not changed.

Q. Now then, Colonel, will you describe briefly the long-range plan now in existence with respect to Camp Pendleton?

A. We devised in 1946 a basic long-range plan for Camp Pendleton which was to ultimately, since it was a permanent establishment and since most of the structures there were erected for a life of only five or 10 years, to ultimately replace each and every one of those with a permanent structure.

The price or cost estimate at that time ap-

(Testimony of Elliott B. Robertson.)

proached \$250,000,000. We have been able to accomplish very little of that program due to limited appropriations.

The warehouses in Chappo flats originally were built of permanent construction. There are eight warehouses at a cost of about three and a quarter million now under construction in Chappo flats—permanent construction.

There is a barracks in Chappo Flats with a capacity of 1,400 men. That was built at a cost of about \$4,000,000.

Recently completed and not yet occupied and of permanent construction. [656]

We have under construction in four locations within the camp barracks and appurtenances to accommodate 13,000 men. They are not of the scale and level of quantity that we would like to have for permanent construction but due to limitations of funds and the necessity of getting the work done quickly, they are being built of reinforced concrete but very austere in nature.

The Court: I gather then the object doesn't have reference to size or enlarging the facilities so much as it does to making them of a permanent character.

The Witness: I didn't go all the way with my story, sir. I said that the plan at that time was to replace what was there.

The Court: Yes.

The Witness: There have been certain changes in the outlook of the Marine Corps, principally



(Testimony of Elliott B. Robertson.)

occasioned by a law passed by the Congress in the past year which drastically increased the permanent strength of the Marine Corps.

Q. (By Mr. Shryock): To what figure, Colonel?

A. Well, the law is in terms of combat units—three Marine divisions and three air wings and supporting troops.

When that law was passed we had to decide where to house those people and how to train them and so forth.

An allocation was made for Camp Pendleton which required an expansion over the then strength in the amount—that is [657] the expansion in the amount of 24,000 billets at Camp Pendleton.

Q. Well, is it not true that in referring to that recent law they have spoken of so many thousands of men or hundreds of thousands of men in the Marine Corps?

A. The law as it originally started was called “the 400,000 man Marine Corps bill,” but it was reduced to combat units and I am trying to figure whether I should answer you in numbers from the standpoint of classification.

The Court: I think that is sufficient.

Q. (By Mr. Shryock): I think that is what we had in mind.

Now, will you tell us what the present population of Camp Pendleton is, breaking that down into such categories as you think may help to present the picture.

A. As of October 30th there was a gross popu-

(Testimony of Elliott B. Robertson.)

lation of 49,123 people at Camp Pendleton, the Naval Hospital and the Naval Ammunition Depot.

They were divided 1,843 officers, 41,015 enlisted men, 2,531 civilian, employed and resident—not all employed but not all resident, but a combination. 2,906 dependents living on the station. 828 patients in the hospital. I have that breakdown by the three subdivisions.

The Court: “Dependents” are children of personnel?

The Witness: Wives and children and aged mothers, et cetera. [658]

Q. (By Mr. Shryock): Now, Colonel, this long-range plan of which you have been speaking, has that been reference to a particular fiscal or budget year?

A. It was. It is what the name implies, a long-range plan and within the budget limitations of any given year we tried to accomplish the current increment of that plan. The economy of the country would not support the long-range plan of all the services in any one year.

Q. Well, have you particularly identified a year in forming your conclusions as to the implementation of the long range plan?

A. We have had a current year plan beginning in 1946. No year in which we have had complete appropriations. The biggest appropriation year or years has been fiscal year '51-'52 and the work that I just described is the work being done from those appropriations.

(Testimony of Elliott B. Robertson.)

Q. Well, have you given any particular——

The Court: Just a moment. Let me ask one question—well, you finish your question. [659]

Q. (By Mr. Shryock): I was going to ask whether you had given any particular attention to the budget year 1954, or the fiscal year 1954?

A. We have.

Q. In what respect?

A. We have a program of items which we intend to present to the Congress in requesting appropriations for Camp Pendleton. Items of this nature have to be specifically authorized, that is to say, each structure and its location. We can't say we need barracks for 1,500 men and build them in Mojave instead of Camp Pendleton. You have to justify them at Pendleton, and then build them in Pendleton.

Mr. Shryock: Let me interrupt at this moment. Did the court care to ask a question?

The Court: I wanted to stop at that man hours, or at the number of men, in view of some statement that Mr. Dennis made. You say this is your best year, the most generous year?

The Witness: That is the best year as to money.

The Court: As to money. How about the proportion? Has there been any great change? Say, let's take it back to a couple of the lean years, and see if there has been any great deviation, because that may be very interesting. It may well be that these appropriations of money may mean better structures and not make any material change in the

(Testimony of Elliott B. Robertson.)

number of persons for whom you have to have water. [660]

The Witness: The current strength is the figure I read, as of 30 October.

The Court: Yes.

The Witness: The total strength for the 1954 budget is: Officers, 3,844; enlisted, 62,037; civilians, 2,527. Those figures, when added, with their prospective dependents, would give us a gross population of 105,456.

The Court: All right. Then go back to a lean year, and let me see how your increase in 1954 is. You have given the prospective.

The Witness: Yes, sir.

The Court: I want you to project yourself into the past and take a couple of the lean years, and tell me what your population was, if there has been any change.

The Witness: The lowest year is 1946. The military population of Camp Pendleton was 11,080, civilian population, 662, and the combined population of the Naval Ammunition Depot 930, which is, roughly, 11,000.

The Court: Just a minute. I am not going to ask for the intervening years. That gives you a good idea, in 1946, when we were disarming, and then you were all going on home. Then everything started up again. So I will leave it right there.

Mr. Shryock: I simply wanted to point out to your Honor that 1946 was well known as being the



(Testimony of Elliott B. Robertson.)

year of the great [661] demobilization for all of the services.

Mr. Dennis: But you will not foreclose me on cross examination from going into some of these, because I think the figures for the various years are important.

The Court: Mr. Dennis, I just did not want to break into the continuity.

Mr. Dennis: Just so I am not foreclosed.

The Court: I wanted to see the pattern, and see what develops. All right.

Q. (By Mr. Shryock): Now, then, Colonel, reverting to your reference to the long range plan for the budget year 1954, does that anticipate a realization of the long range plan if the Congress should appropriate the funds which you hope to get?

A. Realistically speaking, we don't hope to get enough, and we have not asked for the entire amount required, but the population strength on which the 1954 budget is based, and the numbers I gave, is now considered to be the permanent long range never to be reduced strength of Camp Pendleton.

Q. And that figure is 105,000, roughly; is that correct?

A. That is the constructed and projected strength.

Q. And is that budget actually to be submitted on that basis, whether or not it is accepted?

A. It has been submitted. [662]

(Testimony of Elliott B. Robertson.)

Q. Colonel, will you state whether or not you have had any occasion to go into the question of the required use of water, of the duty of water of persons connected with a military post, such as Camp Pendleton?

A. The Marine Corps has made a determination based on usage at all of our stations that the requirement is 200 gallons per day per capita.

Q. Now, is that a figure that you just took out of thin air, or is that a figure arrived at after some consideration of factors, and, if so, what factors?

A. As I said, it was derived from our experience, and I have a chart here, which I have extracted from the records of my office myself. And some of the files back down through are not available due to an evil called the record retirement program, but I will give some of them.

Marine Corps school, Quantico, Virginia, beginning in 1945, 266. In 1946——

Q. Excuse me, Colonel. The figures you are giving now are gallons per person per day, are they?

A. That is correct. In 1946, it was 374. The lowest gallonage at Quantico over the years was in 1952, of 293.

Camp Lejune, North Carolina first record 1948, was 216; 1949, 201; and so forth.

Paris Island, South Carolina, in 1947, 196; 1948, 267; [663] 1949, 235.

The Court: Have you corresponding figures for Camp Pendleton?

The Witness: Camp Pendleton, we have three

(Testimony of Elliott B. Robertson.)

records for 1943, '44 and '45, which I don't think are any good. Beginning in 1946, the first record of value, is 284; 1947, 285; 1948, 353; 1949, 268; and the lowest year there is 1952, in the amount of 152.

Q. (By Mr. Shryock): Well, Colonel, I think the Court might be interested even in those three years which you say are no good. I take it, those were combat years with tent construction?

A. I feel this, and I know that the maintenance and utility reporting system we have now was not in effect then.

Q. Oh, yes, if the records were inadequate, all right.

A. They are fragmentary reports, and the accommodations for the men were much more primitive.

The Court: What do you attribute the decrease in the amount per person to? Is it the better house-keeping? You see, I am beginning to use your terminology.

The Witness: It is due primarily to the stringent conservation and water restriction.

The Court: Well, that is good housekeeping.

The Witness: It has gone beyond good house-keeping, sir. We have things dirty for lack of water. [664]

The Court: I see. I am looking at the clock. Is this a good stopping point?

Mr. Shryock: I believe it would be, your Honor.

The Court: All right, gentlemen. Tomorrow morning at 10:00 o'clock.

(Whereupon, at 4:40 o'clock an adjournment was taken until 10:00 o'clock a.m. of the following day, Friday, November 7, 1952.) [665]

The Court: Ex parte matters. Cause on trial.  
Mr. Shryock: Colonel Robertson, please.

ELIOTT B. ROBERTSON

having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Shryock): Colonel, I believe when we concluded yesterday that you were testifying as to the matter of the 200 gallons per person per day for people in a military reservation such as Camp Pendleton.

Have you compiled any figures as to the acre footage of use, using that figure as a basis?

A. The requirement for the strength which we considered to be the permanent future strength of Camp Pendleton is approximately 23,500 acre-feet per year.

Q. Was that based on the long range figure of a total population of 105,000 persons that you mentioned yesterday?

A. That is correct. That number of people times the number of gallons, times the number of days converted to acre-feet.

Q. Now yesterday, Colonel, I believe you men-



(Testimony of Elliott B. Robertson.)

tioned the fact that in 1946 the military population of Camp Pendleton [668] was some 11,000 men.

Have you at my request computed the peak military population during the combat years of World War II at Camp Pendleton?

A. I didn't compute it but before I left Washington I examined the records at headquarters and determined that the population at its peak was approximately 56,000 military. I was unable to, in the time I had, to uncover the dependent population but it was very small.

Q. And that would have been during one of the years, 1943, 1944 or '45?

A. It was late 1944.

Q. Col. Robertson, in dealing with the water problems at Camp Pendleton has the matter of the construction of a dam figured in the plans of the Marine Corps and the Station Development Board?

A. We have determined it to be necessary to install a regulating structure on the Santa Margarita River at the site which has been referred to as the DeLuz site.

Q. What have been your results so far?

A. Well, we had a dam authorized by the Congress and had a partial appropriation. That authorization was rescinded by the last Congress.

Q. Was there anything which occurred prior to the rescinding of that authorization which indicated why you were [669] not having success in obtaining your appropriation for this dam?

A. There was quite a series of events but I think

(Testimony of Elliott B. Robertson.)

it came to a head in a hearing before the House Armed Services Committee, which I attended, wherein the chairman and other members of the committee stated that they had no desire to make additional investments at Camp Pendleton until such time as the Marine Corps could come in and assure the committee that we had an adequate amount of water to protect that investment.

Q. Was that after this litigation had been commenced? A. It was. [670]

Q. Now, one final thing. Returning to these figures of consumption per person of water, Colonel, did you compute how many persons would be supported by one acre-foot of water per year?

A. One acre-foot of water per year will support approximately four and a half, or a little less, 4.46 persons, I believe, throughout the year.

Q. And that is on the 200 gallons per day basis?

A. That is correct. And another computation I made: The 105,000 strength that we mentioned would require approximately  $64\frac{2}{3}$  acre-feet per day.

Q. For the entire population?

A. That is correct.

Mr. Shryock: You may cross-examine.

#### Cross Examination

Q. (By Mr. Dennis): Colonel, are you familiar with the map which we have referred to as Map No. 1, which was furnished by the Government in response to the defendant Santa Margarita Mutual Water Company's written interrogatories?

(Testimony of Elliott B. Robertson.)

A. I have looked at that map several months ago.

Q. Are you familiar with the map which is in evidence as Plaintiff's Exhibit, I believe it is, 22?

A. I am.

Q. And on both of those maps there are various squares [671] and oblongs in black which have been placed upon the map in various localities, are there not?

A. That is correct.

Q. And those represent buildings?

A. They represent structures of various kinds.

Q. Either supply structures or barracks, or mess halls?

A. That is correct. Buildings, tanks, and what have you.

Q. And those buildings have been constructed on the military reservation from time to time?

A. That is correct.

Q. Now, I want the sheet that has the Naval Ammunition Depot. This is the sheet, entitled "Fallbrook." There are various roads with a circle in the center of a loop?

A. Yes.

Q. Those represent magazines?

A. They represent the approximate sites of magazines. Those are roads that are shown.

Q. What does the circle inside the loop represent?

A. Which circle inside which loop?

Q. Well, for instance, there is a circle inside the loop in the square 729——

A. '91.

Q. 7291. [672]

A. Point out the circle. That is a square.

(Testimony of Elliott B. Robertson.)

Q. That is a square. But not colored?

A. That is correct.

Q. And that would represent the approximate location of the magazine?

A. That is correct.

Q. And it is necessary, is it not, to locate those magazines at some distance from one another for the purpose of safety?

A. That is correct.

Q. It would be extremely hazardous to allow the public or agricultural or grazing activities in the immediate neighborhood of those magazines?

A. Grazing activities are carried on there.

Q. How about agriculture?

A. No cultivation.

Q. No cultivation. Those grazing activities are only carried on during the wet season of the year?

A. As to Fallbrook Naval Ammunition Depot, I cannot say for sure.

Q. Now, Colonel, I believe that all of the pumps and wells which are located in the Ysidora, O'Neill and Chappo basins are owned and operated by the United States of America.

A. They are owned by the United States of America. [673] The statement as to operation is not entirely true. There are a couple of wells which are supervised by the Government. As testified to by Mr. Taylor, there is an irrigation system lessee there. [674]

Q. And I believe that the buildings and structures which are shown on the two exhibits, which you just mentioned, have been erected on the prop-



(Testimony of Elliott B. Robertson.)

erty from time to time after it was acquired by the United States of America?

A. There are some structures shown on those maps which existed before our time.

Q. And when the additional structures were erected it was necessary to extend the irrigation system or the pipelines that were on the property at the time that you acquired the property?

A. The irrigation system to my knowledge has not been extended in our time.

Q. Have the pipelines been extended?

A. The pipelines—pipelines have been created and extended during our time.

Q. I used the term somewhat loosely as “the irrigation system” meaning the whole system for distributing water.

Mr. Shryock: I don’t believe he answered that, if you made it as a question.

Mr. Dennis: No, I just made that statement to clarify my question.

Mr. Shryock: I see.

Q. (By Mr. Dennis): Now, I believe yesterday you testified that an expansion in the amount of 24,000 billets at Camp Pendleton was expected. What did you mean by the term “billets?” [675]

A. I meant by “billets” a place for a Marine to sleep, live and eat.

Q. That would mean it is anticipated that the camp will be expanded so as to take care of approximately 24,000 additional men?

A. That is correct—that is in buildings.

(Testimony of Elliott B. Robertson.)

Q. And I believe that it is a fact that you have camp buildings and structures for the accommodation of men located in San Mateo Canyon, San Onofre Canyon? A. Yes.

Q. And other canyons on the ranch outside the watershed of the Santa Margarita River?

A. Yes.

Q. And it is anticipated that a portion of the expansion of the camp will take place in those portions of the ranch which are outside the watershed of the Santa Margarita River?

A. That is right.

Q. It has not been the custom in the past of stationing all the men inside of the watershed of the Santa Margarita River? A. No.

Q. And you don't anticipate that future policy will require they all be stationed within the watershed of the Santa Margarita River?

A. I think that the current situation is a pretty good [676] indication of how our plans are laid. Roughly 70 per cent of the people housed at Camp Pendleton now are watered from the Santa Margarita and an examination of our plans indicate to me that that figure is a pretty close approximation of what we would have then.

Mr. Dennis: I wonder if you would read that question back to me, please.

(Answer read.)

Q. (By Mr. Dennis): Now, have you under construction now or have you had at any time under construction any barracks, camp barracks and ap-

(Testimony of Elliott B. Robertson.)

purtenances outside the watershed of the Santa Margarita River?

A. Would you read the question please?

(Question read.)

A. Yes.

Q. Now, I believe that you testified yesterday that on October 30 there was a gross population of 49,123 people at Camp Pendleton in the Naval Hospital and Naval Ammunition Depot?

A. That is correct.

Q. Do you know how many of that personnel—what percentage of that personnel was stationed at the Naval Ammunition Depot?

A. A total of 486 people.

Q. And the balance were stationed at Pendleton?

A. Including the Naval Hospital.

Q. And that would be both within and without the watershed of the Santa Margarita River?

A. That is correct.

Q. Would you say that the number of people that were stationed at Camp Pendleton on October 30 was substantially the same for the water year commencing October 1 of 1951 and terminating September 30th, 1952?

A. As I understand the question is the population now the same as it was throughout that water year.

Q. Is it fairly constant?

A. It has been progressively increasing.

Q. Could you give me the number of people

(Testimony of Elliott B. Robertson.)

who were stationed at Camp Pendleton on October 1st, 1951?

A. I could not give it to you precisely. It is in the neighborhood of 30,000 military population.

Q. That is the military population?

A. Yes.

Q. And could you give me the approximate number of civilians who were employed or resident on October 1st of 1951?

A. I don't have that figure but I believe from the records I can make an estimation for you.

Q. Just approximately.

A. In the neighborhood of 900. [678]

Q. And can you give me an approximation or estimate of the number of dependents which were living on the station on October 1, 1951?

A. 1951?

Q. Yes, 1951.

A. My estimate would be 2800. [679]

Q. Could you give me an estimate of the number of patients which were in the hospital at that date?

A. In the neighborhood of 750.

Q. Now, for the 1st of October for each of the years, commencing with 1942, could you give me your best estimate of the number of officers, men, civilians, dependents, and patients which were on the reservation?

A. I cannot do that from the records I have with me.

Q. How far back do you records go that you have with you?



(Testimony of Elliott B. Robertson.)

A. I could give it precisely for the 31st of October, or the 30th of October, this year.

Q. Well, could you give me——

A. (Continuing) I can give you the 1953 budget plan and the 1954 budget plan. That still does not answer your question.

The Court: He wants the prior years.

Mr. Dennis: I want the prior years, Colonel, and if you have any data——

The Court: You started on that yesterday, and I said I was not interested, but Mr. Dennis said he might be.

Q. (By Mr. Dennis): If you have it for any other date during the year, I don't want to hold you to October 1st or October 31st. Do you have it for any date for each year? And could you give me the number of officers, men, civilians, [680] dependents, and patients in the hospital?

A. I have no information as to patients back through the time with me. I have no information—I do have some information as to dependents.

Q. Have you information relative to enlisted men and officers?

A. Not broken down, and it would have to be estimates.

Q. I mean, as to military personnel, have you the figures as to military personnel?

A. I could give you approximations. I could not break it down.

Q. Would you do that?

A. In 1943, there was a population—now, we

(Testimony of Elliott B. Robertson.)

have fluctuations in here. It was a growing situation, and are you addressing yourself to an average or a peak?

Q. An average would be all right.

A. In 1943, about 25,000.

Q. That would be military personnel?

A. That is correct.

Q. And plus civilians?

A. That is correct.

Q. That would be military personnel and civilians and dependents?

A. There were about 180 dependents that year.

Q. That would be in addition to the 25,000? [681]

A. Yes. The 25,000 estimate is loose enough so that the 180 could be plus or minus.

Q. Now, for 1944 have you an estimate?

A. An average would be between 45,000 and 50,000, and a peak of 56,000 military.

Q. And for 1945?

A. An average would be about 28,000.

Q. For 1946?

A. In 1945 is where we began having a considerable number of dependents, roughly, 1800. And in 1946, '47, and '48, we had roughly 2200 dependents.

In 1946 the population of Camp Pendleton was about 11,000 military, or about 11,000—period.

Q. For 1947?

A. The population was about 13,000.

Q. For 1948?           A. About 13,000.

Q. 1949?           A. About 19,000.

(Testimony of Elliott B. Robertson.)

Q. 1950?

A. We grew to about—this is still military—about 24,000.

Q. And for 1951?

A. We grew to about twenty-eight or twenty-nine thousand. [682]

Q. What do you figure your average will be for 1952?

A. Our budget in strength for 1952 is 56,000.

Q. Do you think you will make an average of about 56,000 for 1952?

A. We will make an average of about fifty-two or fifty-three thousand.

Q. Now, could you give me the dependents for 1949 on?

A. 1949, '50 and '51, there were about 2,550 dependents.

Q. And for 1952?

A. The same number of dependents to date. However, we have a new activity there. We have under construction 562 dwelling houses, and have on the site 250 trailer units which are being hooked up.

Q. That is the Wherry project?

A. The 562 are the Wherry project under Title 8 of the Housing Act, and the trailers are being provided under Title 3.

Q. Will they be approximately in the same location?

A. They will not.

Q. Where are the trailer units being located?

A. The trailer units will be on South Coast Mesa.

(Testimony of Elliott B. Robertson.)

Q. Out or inside the watershed?

A. Some of each.

Q. Now, the figures that you gave me for an average [683] military personnel for the years 1945 to 1952, inclusive, would that include civilian personnel as it did for 1943 and 1944? A. Yes.

Q. Now, I believe that one of the first activities of the Government after it acquired Camp Pendleton was to fence the entire camp so as to keep out trespassers and intruders?

A. I don't believe the entire camp has been or is fenced. [684]

Q. At the present time? A. Yes.

Q. Is the entire southern and eastern boundaries? Calling your attention, Colonel, to the map which is known as Map 1 would you say that the boundary line starting at the Pacific Ocean in the vicinity of San Luis Rey River lagoon and extending up to Morro Hill and extending northerly to a point just south of the Riverside County line has been fenced?

A. It has at every point that I have inspected.

Q. And it has been the custom to maintain patrols and sentries so the public can't obtain access easily to the reservation?

A. That is correct. However, the sea coast is not fenced and there is no patrolling along Highway 101.

Q. It is fenced along Highway 101 however?

A. I believe there are highway fences but not Government fences.

Q. And signs notifying the people that it is a



(Testimony of Elliott B. Robertson.)

military reservation and a violation of the law to go on the reservation?      A. That is correct.

Q. Now, Colonel, I believe that you said that you anticipate to have approximately 105,000 people on the reservation at some future time?

A. That is correct.

Q. Can you break that down into military personnel and [685] civilians?

A. I gave the figure of officers, enlisted and civilians yesterday.

There are 3,844 officers. Our planning factor is that 75 per cent of the officers will be married and accompanied by their dependents and desire quarters therefor.

The actual figure is somewhat higher, around 87 or 88 per cent of actual marriages but we do not figure that all of them will be accompanied by dependents and require quarters.

That leaves us 961 bachelor officers. Our planning factor is two and one-half dependents per family which gives us 7,280 officer dependents.

The gross officer population, including their dependents will be 11,052.

The total enlisted population is 62,037. Our planning factor for housing purposes, which do not reflect the true number of marriages—there are actually about 38 per cent of the people married, enlisted people married. Our planning factor for housing is 20 per cent will be married and accompanied by their dependents and desiring quarters

(Testimony of Elliott B. Robertson.)

if they were available and meriting quarters under the law.

That leaves 49,630 men to be housed in barracks. I did not give the number of married families. 12,407 and using the same factor of two and one-half dependents per married military person we have a dependent population for enlisted 31,018, giving us a gross enlisted population, including [686] their dependents of 93,055.

The total number of civilians to be on board is 2,527. This station has been declared isolated for housing purposes by the head of the department and that under current regulations makes us eligible to house on the reservation 75 per cent of those people.

We feel in this case, however, that due to the age of the post and the capabilities of the surrounding community that we will never house as high as 75 per cent of the 2,500 or something, in the neighborhood of 1,800.

Actually we plan to house 160 families. Those 160 families would be accompanied by the usual two and a half dependents giving us roughly 400 dependents.

The remaining civilians over these families are 2,367. They live somewhere else. We do not take full credit for them but since they are there to work eight hours plus their going and coming time, we have taken one-third credit for each civilian living off the post or an effective additional civilian population of 789 persons, giving us an effective net

(Testimony of Elliott B. Robertson.)

civilian population of 1,349 as compared to a gross of 2,527.

Q. And is the civilian population which you gave the figures for the years '43 to '52 housed on the reservation?

A. We have never exceeded 160 families.

Q. Now in your computation as to the amount of water which would be required in gallons per day—I believe it [687] was 200 gallons per day per military personnel did you apply that same figure to the civilians which are going to be housed on the premises?

A. The figure of 200 gallons per day was established not to cover just military personnel but to cover a cross-section of the military establishment so that it is applied to the dependents and military alike. And as I explained due to the fact that the employed civilians who reside away are there roughly more than a third of the time, we only take a third of that as a credit. The adjustment is made at that point.

Q. Now, Colonel, you gave us some figures yesterday as to the amount of water used per man on certain military reservations on the east coast. Have you the figures for the military installations on the west coast, for instance the El Toro Marine Base?

A. I have no figures for El Toro. It is entitled "A Marine Corps air station." It is not financed and managed by the Marine Corps and I have no

(Testimony of Elliott B. Robertson.)

information of my own knowledge in connection therewith.

I have some other stations, however.

Q. On the west coast?

A. Just a moment. I have the San Diego Marine Recruit Depot.

Q. What is the station there?

A. Marine Corps Recruit Depot San Diego.

Q. What do your figures show on the Marine Corps Recruit Depot?

A. For any specific year?

Q. For 1951-52.

A. 1951 shows 133.

Q. Gallons per day?

A. Gallons per capita per day.

Q. For 1950? A. 329.

Q. Gallons per day? A. Per capita.

Q. And for 1949? A. 258.

Q. And for 1947? A. 248.

Q. And for 1946?

A. I have nothing earlier.

Q. Have you any other bases or stations in San Diego County? A. I have not.

Q. Have you any figures for any bases or stations which might have been maintained by the Navy? A. I have not.

Q. Or for the Army or for the Air Corps?

A. I have made no attempt to do that. These figures [689] were compiled and the figures established on the basis of Marines.

Q. Now, do you have the personnel that has



(Testimony of Elliott B. Robertson.)

been stationed at the Naval Ammunition Depot since it was established?

A. I must say that these figures were acquired by me from sources outside of my office, from inquiry and I do not know of my personal knowledge.

There are 80 dependents or were, from 1945 to 1952.

Q. That is dependents?

A. Dependents, and the combined military and civilian population was in 1942, 455; in 1943, 670; in 1944, 923; in 1945, 1,160; in 1946, 930; in 1947, 345; in 1948, 265; in 1949, 252. I think I have the information for the later years. 1950, 256; 1951, 360 and 1952, 412.

Q. Now, Colonel, are you familiar with the amount of water that the State of California figures amounts to a reasonable use for domestic use per person per day in gallons?

A. I do not.

Q. You made no effort to ascertain what the department has determined or the Division of Water Resources, the state engineers, have determined as a reasonable amount of water for domestic purposes per person per day?

A. I have not. I have studied the text books that are available to our profession and I have concluded that a cross-section figure for a city like Los Angeles or a [690] County like Los Angeles County cannot be applied to a military establishment, but that you would have to take a selected area of that place for a comparison.

For example, there are people who never wash

(Testimony of Elliott B. Robertson.)

at all. There are people who wash on Saturday night. There are people who wash every day and we believe that our military establishment as it should be conducted, is comparable to a high-class suburb. [691]

Q. I agree with you on that, Colonel. Would you say that the water which is consumed by the military establishment is primarily consumed for what would ordinarily be termed domestic use, that is, bathing, cooking, and cleaning facilities, as distinguished from maybe the flushing of streets or the washing of military equipment?

A. Primarily it is. However, the washing of military equipment is a major consideration at Camp Pendleton or any amphibious base, where you have to wash salt water out of the military equipment.

Q. Correct. Have you made any study to determine what portion of the water used at Camp Pendleton has been used in connection with military equipment?

A. I have not.

Q. Now, Colonel, you are familiar with the various sewage plants that are operated on Camp Pendleton and the Naval Ammunition Depot?

A. To some degree.

Q. Is it my understanding that all of the water from the main camp and from the Ammunition Depot is discharging into a sewage system?

A. There are several systems there.

Q. But, Colonel, calling your attention to the map which we have referred to as Map No. 1, which

(Testimony of Elliott B. Robertson.)

was supplied by the Government in response to the interrogatories of the [692] Santa Margarita Mutual Water Company, is the water which is obtained from the installations which are installed on Pilgrim Creek, in the watershed of Pilgrim Creek and the watershed of Windmill Canyon, and I believe we referred to Rattlesnake Canyon, the Naval Hospital and the Supply Depot, which overlie Middle or Chappo basin, all discharged into the sewage plants?

A. They are discharged into sewage plants, that is correct.

Q. The same would be true for Camp Delmar?

A. That is correct.

Q. And, as I understand it, at Camp Delmar are the installations which begin on the southerly boundary of the camp along the Pacific Ocean and extend to approximately the tidal marshes; is that correct?

A. That is correct.

Q. Does all the water which is furnished to the Naval Ammunition Depot discharge into one of the sewage plants?

A. All that arrives into the sewage pipes.

Q. And I believe that would include all water which might be used for cooking or bathing?

A. All that is discharged by the user into the sanitary system.

Q. I believe those plants recover a considerable percentage of that water, which is pumped back into the basin? [693]

A. That is correct.

Q. Would you say, or have you made any studies

(Testimony of Elliott B. Robertson.)

to determine the per cent of the water that is recovered in those plants?

A. I have made no personal study. I have knowledge of figures that have been quoted on it.

Q. Would you say approximately 90 per cent of the water is recovered?

A. It is in the neighborhood of 65 or 70 per cent by my estimate, which is off the cuff.

Q. Now, I believe that you testified that when buildings were first constructed on Camp Pendleton, that they were more or less of a temporary nature, and that you anticipated you would replace them with permanent structures.

A. Due to the material restrictions which existed during the time of the war, those buildings were necessarily erected of substitute and substandard materials, with a projected life in some cases of five years, and in most cases of ten years, that is to say, an economically projected life of that time.

There were numerous permanent buildings that could last or have lasted for hundreds of years, and it could be done here, but not economically, and, therefore, it is our long-range plan to replace them with buildings which could economically be kept up. [694]

Q. Will the permanent structures be erected on the same sites as the temporary structures?

A. In general, yes. In that connection I might say that we have a long-range plan which roughly envisions the use of the camp, which would place the structures in roughly the same places they are.



(Testimony of Elliott B. Robertson.)

However, there are engineering considerations that have to be taken into account, and, with that in mind, we have gone to the Congress and had appropriated to us the sum of \$1,000,000 for detailed architectural and engineering studies which would lead to the specific location of permanent pipe lines, buildings, roads, et cetera.

Q. Now, Colonel, calling your attention again to Map No. 1, and, in particular, to that portion known as Chappo or Middle basin, I notice that the landing strip is located overlying the basin just immediately south and east of the bed of the stream. Does that correctly locate the landing strip?

A. That is correct.

Q. Is that a permanent installation?

A. The strip is, yes.

Q. And the series of black rectangles which lie just east and south of the Topeka & Santa Fe Railroad track and overlying Chappo basin, that is a permanent installation?

A. That is the supply depot——

Q. The supply depot?

A. ——and is permanent. [695]

Q. Then I notice there are some rifle ranges which are located on the opposite side of the river bank overlying Chappo. Is that a permanent installation or temporary installation?

A. The range itself is one of those things that can be moved without much effort, and they often are. I wouldn't class it either way.

Q. You did, however, select that site because of

(Testimony of Elliott B. Robertson.)

its location to the main camp and the character of the terrain?

A. That is correct. However, at that particular range, we are now building a camp very close to it, and the effect of the camp may be to move the range.

Q. And as additional men are brought into the camp, it will be necessary for you to restrict the agricultural operations on the ranch?

A. As additional men come in, and if and as the water supply fluctuates, we will fluctuate the amount of water made available for agriculture.

Q. I wonder, Colonel, if you will answer my question. It is going to be necessary, if additional men are brought on to the camp, that the agricultural acreage will be decreased to give more training areas?

A. Now, you are speaking from a training-area standpoint?

Q. From a training-area standpoint. [696]

A. It is entirely possible that a good portion or a large portion, possibly all, of agriculture would have to be suspended there, under certain conditions.

Q. That is, if additional men were brought on?

A. If the men are brought there in that kind of number, that is correct.

Q. You understand when I refer to "the ranch," I am referring to the reservation?

A. That is right.

Q. Now, calling your attention, Colonel, to the United States Naval Hospital, which is located on

(Testimony of Elliott B. Robertson.)

the westerly side of O'Neill Lake, and which overlies a portion of O'Neill basin, would you say that is a permanent installation?

A. It is permanent in the same sense that Camp Pendleton is a permanent establishment. The structures themselves are in the same category, generally, as the structures at Pendleton, with the exceptions I noted yesterday, and some of which you noted today. The Bureau of Medicine and Surgery, which is the operator and manager and financier of that hospital, have in their current budget permanent structures for that place.

Q. Colonel, have you any idea of the acreage which is occupied by the supply depot and the air strip?

A. I have never attempted to ascertain it.

Q. Now, Colonel, I believe that you testified on [697] direct examination that there was a bill in Congress to appropriate funds for the construction of a dam, during the last session of Congress; is that correct?

A. I don't believe I said that yesterday, but it is a fact.

Q. It is a fact. Could you tell us the type of dam which you propose to construct at the De Luz site?

A. Did you say "propose" or "proposed" with a "d"?

Q. Well, the bill asking for an appropriation requested a specific sum of money, did it not, for the construction of a dam of a specific type and capacity?

(Testimony of Elliott B. Robertson.)

A. You want to know what was proposed at that time?

Q. That is correct.

A. There was a large dam proposed at that time, based on knowledge which was then available to us, which predicted would give a certain safe yield per year, and our investigations in connection with this case and in connection with our planning for Camp Pendleton have indicated to us that the basic information there in some cases was in error, and that it is not feasible or economically possible to build a dam with that yield, and we have no intention of pursuing that plan.

The authority was rescinded, and we have a different type of structure now being prepared for submission to Congress. [698]

Q. However, the dam that was anticipated at that time had a storage capacity in excess of 200,000 acre-feet?

A. Something in that neighborhood.

Q. And the studies which you had in your possession at that time had indicated it had a safe yield of in excess of 20,000 acre-feet, did it not?

A. Yes.

Q. And the studies which you had in your possession were obtained as the result of rather prolonged joint investigation of the Bureau of Reclamation and the Corps of Army Engineers, were they not?

A. I am not sure that I ever saw any Bureau of Reclamation work. However, on examination of the



(Testimony of Elliott B. Robertson.)

study which you mentioned, we found several factors which in layman's language would say to me the report is no good.

Q. Well, last year—I believe it was last year, and you correct me if my statement is not correct—the Corps of Army Engineers did make a rather lengthy and exhaustive report and recommendation in regard to the construction of a dam, an investigation of the Santa Margarita River and for the construction of a dam at the De Luz site?

A. That is correct.

Q. And that report has been available to your office?

A. I have read it.

Q. And it has been available to the Office of Ground [699] Water Resources at Camp Pendleton?

A. I cannot answer that question. I do not know.

Q. You do not know whether the information which was contained in that report was given to Mr. Henderson, Mr. Worts, and Mr. Muehlberger, who testified here previously?

A. I don't know. I might say in that connection that from my standpoint the reason that my office did not make it available is that we wanted independent results.

Q. You did study the report, however, after it was consummated by the Army Engineers?

A. That is correct.

Q. Do you know how long a period of time was consumed in the preparation of that report?

A. Something on the order of a year, 15 months.

(Testimony of Elliott B. Robertson.)

Q. Didn't the Bureau of Reclamation start gathering facts for that report in 1947?

A. I have no knowledge of the Bureau of Reclamation's activities in that connection.

Q. Now, I believe yesterday that Mr. Taylor testified that there had been some dams constructed in the bed of the Santa Margarita River, which he termed, I believe, spreader dams. Are you familiar with those dams?

A. I think Mr. Taylor very aptly described them when he called them sand dikes. As a conservation measure we have at various points along the stream with a bulldozer [700] pushed up the native material, largely sand, and in some places a foot high and in some places eight feet high, with a view of arresting the flow of water when it comes.

In the rains last winter, the first few days, the first one held, and the next time it lasted two or three days and went out, and, finally, the last one went out. It was an effort to retain the water and force it, or hold it while it percolated in the basin.

Q. And there were similar dams that had been constructed in the bed of the Santa Margarita River prior to the time that you acquired the property?

A. That I can't testify.

Q. Well, there are dams of the type which you have just referred to which obstruct the flow of the river and which did not go out during the last season, rainy season, are there not?

A. None that I know of.

Q. In other words, so far as you know all of

(Testimony of Elliott B. Robertson.)

the dams that were placed across the river in Chappo and O'Neill or Ysidora basins were destroyed by the floods?

A. They were progressively destroyed until finally the last one went out.

Q. Now I believe that the past history of Camp Pendleton indicates that the personnel will fluctuate considerably over a period of years?

A. It indicates to me that it has fluctuated.

Q. And it is reasonable to believe that it will fluctuate in the future due to the fact that it is a military installation?

A. The Marine Corps' official view on that is that we will not fluctuate at Camp Pendleton and we have so stated this year in our budget submission to the Congress, in view of the very recent Congressional action fixing the minimum [702] size of the Marine Corps as to combat units.

Q. That will be over a period, we will say, of four or five years, but in the event the present emergency disappears that we are confronted with, the Marine Corps, like all other military installations will probably be reduced, won't they, Colonel?

A. That is conjecture. The law is permanently on the statute books.

Q. Now I believe that you testified that the plan of constructing a dam at the DeLuz dam site would impound some 200,000 acre-feet of water and that that plan has been abandoned by the Marine Corps as being impractical?

A. That specific plan was never adopted by the

(Testimony of Elliott B. Robertson.)

Marine Corps after we studied the thing.

Q. But you had come to the conclusion that that is impractical and economically unsound?

A. That is right.

Q. And at this time the only plans which you foresee for the impounding of water on the river would be a dam to spread water so that it percolates into the three basins will be materially increased?

A. No, that is not correct. Our idea as testified by Mr. Henderson, is to build a structure for regulation. As I understand your question you are referring to something similar to the sand dikes just described. [703]

Q. No, more permanent, a little more substantial.

A. We are talking about a structure the studies of which are not complete.

Q. The studies are not complete?

A. But from a preliminary view somewhere between fifty and sixty thousand acre-feet of storage or capacity I should say, with a view of arresting the high flow until the basins below will take it and then release it for recharge.

Q. After the basin is filled to capacity what will you do with the water that is impounded behind the dam?

A. Oh, I don't know at this time and at this stage of the study that there would be any in the dam at that point.

Q. Is it anticipated that water will be stored



(Testimony of Elliott B. Robertson.)

on more or less a permanent basis in the event that the basins are filled to capacity?

Q. With the projected population of Camp Pendleton and the development now planned the basin would almost never be totally full except immediately at the end of a period of high precipitation.

Q. Well, Colonel, it is true, is it not, that it is not going to be possible to obtain a sufficient quantity of water during the dry season of the year from the stream flow of the Santa Margarita River to meet the needs of the expanded camp and that the only way that you will secure adequate water during the dry season is by permanent storage or an impounding [704] of the waters?

A. Well, it is not possible to obtain the need from the direct flow of the stream during that season. However, the basins comprise a large underground reservoir where we propose to store our water and use the dam for recharge thereof.

Q. In other words, you propose to store water underground as well as on the surface?

A. That is correct.

Q. And it is true that there would be years, based on the historical studies which you have made, that there would be years in which you probably could not supply or obtain a sufficient supply of water from the stream flow to meet the needs of the expanded camp?

A. From the direct flow of the stream.

Q. From the direct flow of the stream. So it

(Testimony of Elliott B. Robertson.)

would be necessary for you to fall back on storage, either underground or surface?

A. That is correct.

The Court: The underground storage is not localized at all?

The Witness: Yes, it is. It is pretty well defined as was testified to by Mr. Worts and others.

It runs from basically the lower end from Ysidora Narrows up to the confluence with DeLuz.

Mr. Dennis: I don't believe that Col. Robertson has any different thing in mind in storing water in the basins that underlie Camp Pendleton than the Vails when they obtained a permit from the State of California to appropriate waters and store them in the Pauba Basin. I mean it is just a question of storage—whether sometimes you store water underground and sometimes you store it on the surface.

If you can store it underground I think it is acknowledged that that is a better method of storing than on the surface because you don't have the loss from evaporation, that is, provided you have well defined basins such as the plaintiffs have testified to in this case.

The Court: Well, except that the underground basin can be pumped by anybody because it is not under the control of any particular person. While if you have it in a surface reservoir or storage reservoir it is subject to control of the person who controls the reservoir.

Mr. Dennis: In this instance, your Honor, where

(Testimony of Eliot B. Robertson.)

the evidence is that the basin entirely underlies the plaintiff's property and nobody has any rights to pump—pumping is done either under permit from the plaintiff and the same thing exists in the Vail basins. All portions of those underlie the Vail properties and therefore they are willing to store it underground rather than on the surface and I am sure Mr. Vail's basins in the Temecula alluvial [706] section—there is only a portion of that underlying the Vail property and they would have stored all the water in the surface reservoirs but by controlling the basins they prefer that and I think it provides better storage.

The Court: They don't control the flow of the basins as they would control the surface storage. You just pump it in there and leave it there and it finds its own level and goes in whichever direction it desires.

Mr. Dennis: That is correct. I think the evidence in this case—that is the Isopach map which I believe is Plaintiff's Exhibit 11 and the profile which I believe is Exhibit 12, show the definite limitation of the basin and the material through which the water flows.

The Court: That is true, but both in law and factually it is a very different thing between underground storage and surface storage.

Mr. Dennis: I think that is true. I think the Plaintiff's rights in regard to the two types of water are somewhat different, too, under the laws of the State of California.

We haven't argued that yet but it is something that I propose to argue at the close of the case.

I think your Honor got a preview of it, perhaps, from my brief which I filed.

The Court: All right.

Mr. Dennis: That is all. [707]

The Court: Any redirect?

Mr. Shryock: Mr. Grover?

Mr. Grover: No questions.

Mr. Shryock: No questions. Thank you very much, Colonel.

The Court: We will take a short recess.

(Short recess.) [708]

The Court: Call your next witness.

Mr. Shryock: Your Honor please, I should like to state briefly the purpose of calling our next witness.

The Court: Yes.

Mr. Shryock: For some reason there seems to have been some doubt cast upon the exact nature of the title that we acquired, particularly as demonstrated in one of the briefs. We have no wish to close our case without giving as complete a story as possible of the entire property and the nature of our title, and we, therefore, would like to call Mr. Agnew to the witness stand.

The Court: All right.

#### DAVID W. AGNEW

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:



(Testimony of David W. Agnew.)

Direct Examination

The Clerk: What is your name, please?

The Witness: David W. Agnew.

Q. (By Mr. Shryock): Will you state your residence, please, Mr. Agnew?

A. 930 Dartmouth Drive, Alexandria, Virginia.

Q. And what is your present permanent occupation?

A. I am an attorney with the Department of Navy, in the Bureau of Yards and Docks.

Q. Are you a member of the bar of the highest court [709] of any state?

A. Yes, sir, the State of Wisconsin.

Q. How long have you been with the Bureau of Yards and Docks of the Navy Department?

A. Since 1942; July, 1942.

Q. Has your position in that Bureau been one of attorney?

A. That is right.

Q. Will you describe briefly, Mr. Agnew, the nature of the mission of the Bureau of Yards and Docks, as it relates to the real estate of the Navy Department?

A. The Bureau of Yards and Docks acquires title or any other interest in real estate in lands desired for use by the Department of Navy.

Q. In the course of accomplishing that mission, is it the function of the attorneys in the Bureau of Yards and Docks to examine into the nature and extent of the titles acquired by the United States?

A. It is.

Q. Have you had occasion, Mr. Agnew, to exam-

(Testimony of David W. Agnew.)

ine the title acquired by the United States to the entire military reservation known as Camp Pendleton, which we have been referring to in this proceeding?      A. Yes, sir.

Q. Will you state your professional opinion as to the [710] nature of the title which we acquired, and the nature and extent of the riparian rights which went with that title?

A. We acquired the fee simple title to the property, together with, in my opinion, such rights to the use of water from the Santa Margarita River——

Mr. Dennis: Just a minute. I object to the witness giving his opinion as to what rights they acquired. That is a matter of law to be determined by this court from the documents upon which the plaintiff acquired title, and the maps and testimony in this court as to the extent of the watershed.

Mr. Shryock: I am asking for the professional opinion of a person highly experienced in the specific field as to which my question is directed, and I believe that he is an expert attorney and he is entitled to express opinion evidence as to this title.

The Court: A researcher of title can state, after a search of title, that so many acres were transferred, or something like that, and that the muni-ments of title called for so much, and give the language, but it seems to me that the question is a little broader than that, Mr. Shryock.

Q. (By Mr. Shryock): Then I shall ask you, Mr. Agnew, if you will state what conclusions you

(Testimony of David W. Agnew.)

have reached as to the riparian nature of the lands which were acquired by this condemnation. [711]

Mr. Dennis: Pardon me. Could I have that question read?

(The question was read.)

The Court: Now, this is the first time you have spoken of condemnation.

Mr. Shryock: Well, then, may I ask the witness, if the court please——

The Court: Let me ask him a question.

Your search of title resulted in showing the means of acquisition were what?

The Witness: Condemnation proceedings, sir, except for approximately 112 acres lying in Orange County, which we acquired by deed, and a small acreage which was always Government-owned, and was transferred to the Navy by the Department of Interior under a public land order.

Q. (By Mr. Shryock): And how much was that latter acreage?

A. I am not sure how much it was. It was relatively small. I would say less than one thousand acres.

Q. All right. Then will you describe the condemnation proceedings, the steps that were taken, and the muniments of title which the United States acquired as a result of those proceedings?

A. As to the Naval Ammunition Depot, which was acquired first, containing approximately 9,000 acres, a condemnation proceeding was instituted late in 1940, I [712] believe, or late in 1941, and

(Testimony of David W. Agnew.)

thereafter a decree of taking was filed, the estimated just compensation deposited with the court, and the fee title vested in the United States.

The Court: Do you know what the date of the decree is?

The Witness: I have it here, sir. In the case of the United States of America, plaintiff, vs. 9,147.55 Acres of Land, More or Less, in San Diego County, California, Rancho Santa Margarita, a corporation, et al., defendants, No. 139-Civil, the decree on declaration of taking was entered on the 21st day of January, 1942, in the District Court of the United States, Southern District of California, Southern Division.

Q. (By Mr. Shryock): Mr. Agnew, have you caused to be prepared for your use a map of the property embraced in Camp Pendleton and had appended thereto a legend? A. I have.

Q. Do you have that before you?

A. I do, sir.

Mr. Shryock: May the record show that I have furnished a copy of that to Mr. Dennis.

Do you have more than one copy?

The Witness: Yes.

Mr. Shryock: I now am furnishing one to Mr. Grover.

The Witness: Commander Shryock, let me take that one, will you, please? [713]

(The document was handed to the witness.)

Mr. Grover: Thank you.

The Court: All right.



(Testimony of David W. Agnew.)

Q. (By Mr. Shryock): Does the legend on that map summarize the acquisition of the various parcels?

A. It does.

Q. Would you briefly describe, then, what the legend discloses?

A. The area outlined in red, containing approximately 122,202.72 acres, was acquired in a condemnation proceeding designated as Civil-197-SD.

Q. And the date?

A. The note here shows a date of December 31, 1942.

Q. Is that the date of acquisition?

A. Let me check that, will you, please?

Mr. Shryock: Yes.

The Court: That has been referred to as a purchase. Of course, a condemnation is an enforced purchase, and I presume the reason why it was done is that, after the action was instituted, you probably agreed on the compensation. Is that the idea?

The Witness: That is right, sir.

The Court: You agreed on the compensation, so there was no need for a trial fixing the compensation, either by the court or a jury. I may have signed the decree. I don't [714] know. I signed so many.

Mr. Shryock: In any event, your Honor is correct.

The Court: At that time we were rotating in San Diego, and almost any of us could have been there at any time. I just wanted to say that, be-

(Testimony of David W. Agnew.)

cause throughout we have spoken of the purchase of the Santa Margarita Rancho, and I think that is what you mean. Is that it?

Mr. Shryock: Yes, sir. [715]

Mr. Shryock: Yes.

The Court: All right.

Mr. Dennis: That was my understanding, your Honor. They were talking about the title they acquired through the condemnation action.

The Witness: We stipulated with the owners, sir, as to the consideration.

The Court: All right. I think that map is like a summary made from books and I think it would be very valuable to have a graphic showing.

Mr. Shryock: If the court please——

The Court: Do you want to explain any others?

Mr. Shryock: I should like at this time to offer this map in evidence as Plaintiff's Exhibit 43.

The Court: All right, it may be received.

(The document referred to was marked Plaintiff's Exhibit 43 and received in evidence.)

Q. (By Mr. Shryock): Do you want to add anything?

A. This area is the Naval Ammunition Depot and is outlined in yellow. That was acquired in the first condemnation.

The second proceeding, United States versus approximately 122,000 acres was instituted and this area which is outlined in red was acquired in that proceeding.

(Testimony of David W. Agnew.)

The Court: I see. [716]

The Witness: The small area up here is the 112 acres I mentioned, which was acquired by deed.

The green area, 1,676.58 acres was acquired by condemnation proceeding, Civil-321 S.D., while the orange area which comprises 1,574.61 acres was acquired for use by the Navy from the Department of the Interior. It was public domain land and was transferred to the Navy under Public Land Order No. 293.

The Court: All right.

Q. (By Mr. Shryock): Now, Mr. Agnew, will you state whether or not the area in yellow which purports to represent the Naval Ammunition Depot acquisition has as its boundary at any point the Santa Margarita River?

A. Yes, the northwesterly—the northerly boundary—the northwesterly boundary of it.

Q. Now will you state whether or not the area in pink, the 122,000-odd acres acquisition has flowing through it the Santa Margarita River?

A. It does.

Q. At what geographical portion of the area?

A. The Santa Margarita River enters the area at the northeasterly corner of Camp Pendleton and——

Q. That is the lower right-hand corner of the map, is it not? A. That is right. [717]

Q. And from there where does it proceed?

A. It flows or it meets the boundary of the Naval Ammunition Depot.

(Testimony of David W. Agnew.)

Q. To the south?

A. To the south. And forms the boundary between the Naval Ammunition Depot property and the Camp Pendleton property and continues to flow in a southwesterly direction along the boundary of the Naval Ammunition Depot and then into Camp Pendleton and from there on through the camp into the Pacific Ocean.

Q. And from the point at which it leaves the boundary of the Naval Ammunition Depot does it not then embrace the river on each bank?

A. Camp Pendleton does embrace the river on each bank.

Q. Until it reaches the ocean?

A. Until it reaches the ocean.

Q. Where I have used the word "pink" I note that the legend uses "red."

The Court: All right.

Q. (By Mr. Shryock): Mr. Agnew, I direct your attention to the fact that on page 5 of the stipulated judgment, which was a part of that section of the—I beg pardon, of the pretrial order, which was that part of the pretrial order headed "Agreed Facts." There appears this sentence at line 16: "For the full 21 miles the course of the [718] river lies entirely within the property of the United States of America."

And following that sentence there is a foot-note which refers to Exhibit 2, the large map to which we have frequently referred, and following the foot-note there is an asterisk. At the bottom of the



(Testimony of David W. Agnew.)

page following an asterisk is this sentence: "Except for such properties and lands as the Atchison, Topeka and Santa Fe Railroad Company may own."

Have you examined the question of the rights which the Santa Fe Railroad may have with respect to the property so acquired?      A. Yes, sir.

Q. And will you describe what you have found with respect to that question and describe the physical relationship of the railroad to the property?

A. I believe that for convenience it would be easiest to discuss that portion of the Santa Fe Railroad which extends parallel to the coast from a point in the southeasterly boundary of Camp Pendleton and then runs in a general northerly direction to the northerly boundary of Camp Pendleton where it enters Orange County.

Q. Is that what we might call the main line of the Santa Fe between San Diego and Los Angeles?

A. That is right, sir.

Q. Now, does it cross the Santa Margarita River?      A. Yes, sir.

Q. And is there any structure at the point at which it crosses?

A. There is a bridge across the Santa Margarita River where the Santa Fe Railroad crosses that river.

Q. How many tracks?

A. It is a single track, sir.

Q. On the bridge?      A. Single track.

Q. Now, have you had occasion to examine any

(Testimony of David W. Agnew.)

muniments of title relating to the rights of the railroad?  
A. Yes.

Q. As respects this property?

A. I have.

Q. Will you describe the nature of those documents?

A. Insofar as the main line of the railroad is concerned, I did not think it was important whether the Santa Fe Railroad acquired either a fee or an easement since the river flows under the tracks at the bridge and the land between the railroad tracks and the ocean front abutting on that river would be considered to be riparian.

However, I have certified copies of the deeds executed by the then owners of the Rancho Santa Margarita to the Southern [720] Railroad, which was the predecessor to the Atchison, Topeka and Santa Fe.

These instruments were executed as early as 1884.

Q. Now, do they have reference to this main line which you have been describing?

A. They do not refer to it as the main line. They, however, identify it with respect to the general course of the railroad.

Q. How much land is involved in the property of which you are speaking?

A. The acreage is not recited.

Q. Well, is it——

A. It is a 100-foot right-of-way. At points it varies a little bit.

Q. Have you examined into the question, how-

(Testimony of David W. Agnew.)

ever, as to whether it is in your opinion a fee or an easement.

A. In my mind it is an easement.

Q. And does that apply to the 100-foot strip which underlies the main line of the railroad from the north to the south boundaries of the camp?

A. Yes, except for small parcels of land which in my opinion were conveyed in fee to the railroad company, but all of those lie outside of the watershed of the Santa Margarita River.

Q. And is there any other portion of the physical [721] construction of the railroad on the Camp Pendleton property?

A. There is; a branch line extending from what is usually described as Fallbrook Junction. It runs up through the camp, through the Naval Ammunition Depot and over to Fallbrook.

Q. And emerges from the Camp Pendleton Naval Ammunition Depot boundary at the lower right-hand corner of the map, from the yellow area, Plaintiff's Exhibit 43?

A. Where did you say, Commander?

Q. At the lower right-hand corner of the map from the yellow area it is depicted as emerging from the United States property, is it not?

A. I would say about the center.

Q. But it is the lower right-hand corner of the map? A. Of the map, that is right.

Q. Now, Mr. Agnew, what conclusions have you reached as to the nature of the ownership of the

(Testimony of David W. Agnew.)

railroad with respect to the spur you have just described?

A. In my opinion that is an easement.

Q. That is substantially within the watershed of the Santa Margarita River, is it not?

A. Yes, sir.

Q. Now, Mr. Agnew, again directing your attention to Exhibit 43, is there a line across approximately the middle of the map in brown which appears to separate the northerly [722] portion of the 122,000 acre tract from the southerly portion?

A. There is.

Q. Will you describe what that is intended to portray?

A. On December 16, 1941, the then owners of the property which now comprises the Nava' Ammunition Depot and Camp Pendleton, executed three deeds conveying the property now comprising the military reservation, to two groups of people.

The deed dated December 16, 1941, conveying what is now the Naval Ammunition Depot property named as the grantees the Floods, the Baumgartners and the Union Trust Company, I believe is the third grantee.

Each of the Floods obtained an undivided one-half interest as tenants in common.

The Baumgartners an undivided one-quarter interest as tenants in common and the trust company the remaining undivided one-quarter interest.

Q. As trustee?



(Testimony of David W. Agnew.)

A. That is right. That instrument covered only the property now comprising the Naval Ammunition Depot.

Q. The approximately 9,000 acres?

A. That is right. The second instrument named as the grantees and is dated December 16, 1941, the Flood interests and conveyed to the Floods the area which is southerly of the line extending through the property from the Pacific Ocean to the northerly boundary or the northeasterly [723] boundary of the camp which is now the camp area.

Q. And is that the brown line to which I previously referred?      A. That is right.

Q. Approximately how many acres were involved in that southeasterly portion?

A. I think that comprised approximately 70,000 acres.

Q. And what was the third deed?

A. The third deed conveyed to the Baumgartners the area lying northerly of the brown line you referred to, and which is shown on this map.

Q. And that contained approximately how many acres?      A. 50,000.

Q. Now referring to that last area of approximately 50,000 acres north of the line in brown on Plaintiff's Exhibit 43, can you state, Mr. Agnew, with reference to this map or to any of the other maps which have been introduced in evidence in this proceeding, whether any portion of this lies in or even close to the watershed of the Santa Margarita River?

(Testimony of David W. Agnew.)

A. It lies outside of the watershed of the Santa Margarita River.

Q. In its entirety?

A. In its entirety. That is the area conveyed to the Baumgartners by the deed of December 16, 1941, the third deed I made reference to. [724]

Q. Is there anything you would care to add with respect to the title of the United States regarding these properties?

A. Well, in order to identify the brown line we referred to, so it can be located on other maps, it follows generally the line of the Horno Canyon.

Q. Does it show south of it, that is to say, out of the northerly tract and in the southerly tract, certain canyons which have been on other exhibits, clearly depicted as being outside of the watershed of the Santa Margarita River?

A. Yes, sir. It discloses Los Pulgas Creek, also Aliso Creek, lying generally southerly of the line we referred to as being indicated in brown on this map.

Mr. Shryock: Now, at this point I should like to make a very brief statement to explain why we have been eliciting what may seem to be somewhat obscure testimony, namely, to establish the fact that if what is bothering the defendants is the fact that there were two deeds for the 122,000-acre tract rather than one deed, and hence that there might have been some severance, that, nevertheless, if there were a severance, which we by no means concede, it was entirely outside of the watershed and

(Testimony of David W. Agnew.)

could not have the slightest legal effect upon the large part containing the approximately 70,000 acres. [725]

The Court: All right.

Mr. Shryock: You may cross examine.

Cross Examination

Q. (By Mr. Dennis): Mr. Agnew, as I understand this portion of Exhibit—43, is it?

A. Yes.

Q. —43, which is outlined in yellow, abuts upon the Santa Margarita River on approximately the northwest corner of what is shown as Section 28, and follows northerly along to a point where there is a figure “14” just above the curve.

A. That is right. It passes through Section 28, Section 21, Section 15, and part of Section 14—

Q. And that is that portion—

A. Just a minute, please. That is in Township 9 South, Range 4 West.

Q. And that is that portion of the stream bed of the Santa Margarita River through which I believe your witnesses have heretofore testified the Santa Margarita was entirely surface stream, or practically surface stream at that point?

A. That is the way I understand it.

Q. And at that point practically all of the flow of the stream would be that which would be recorded at the Fallbrook gauging station, practically so?

A. That is the way I recall it, except for certain

(Testimony of David W. Agnew.)

[726] minor amounts of water which may flow below the veneer on top of it.

Q. Now, are you familiar with the descriptions which were used when you acquired these properties? A. Yes.

Q. Are portions of the Naval Ammunition Depot what we call sectionized property, as distinguished from that portion of the property which was included in these old boundaries of the original grant? A. Part of it is sectionized, yes.

Q. Do you know which part of it is sectionized property?

A. According to this map, the entire area was sectionized. It indicates that the records show it is sectionized property.

Q. This is the map through which the lines—you recall our original Spanish grants were not sectionized? A. Yes.

Q. Is it not a fact that certain parts of the Naval Ammunition Depot were acquired through patents from the United States Government and were not included within the exterior boundaries of the original Santa Margarita grant?

A. Would you repeat that question, please?

Q. I say, it is true, is it not, that certain portions of the United States Naval Ammunition Depot were not [727] included within the exterior boundaries of the original Santa Margarita grant?

A. Not to my knowledge.

Q. In other words, so far as you know, there is no sectionized property which was acquired by



(Testimony of David W. Agnew.)

patent by the United States within that area, as distinguished from the decree confirming the old Spanish grant?

A. The small area lying out here possibly was acquired through patent from the United States. Now, when I say "through patent," I do not have reference to the patent issued by the United States to Pio Pico and Andreas Pico, dated April 8, 1879.

Q. Now, have you made any attempt to run a chain of title on this property, that is, an examination of the instrument when the property was first conveyed by the sovereign power to the individual?        A. Yes.

Q. You have done that?        A. Yes.

Q. Is the deed to which you referred as conveying a right of way which is now occupied by the Atchison, Topeka & Santa Fe Railway as a spur line the original deed wherein that right of way was created, or is that the deed where there was an exchange of documents after the line had been first constructed? [728]

A. When the line was first constructed, it ran up and followed the river and extended up through what is now called Railroad Canyon. I examined the deed through which the interest in the property covering that right of way was conveyed to the California Southern Railroad Company. That part of the railroad was washed out, I understand, in a flood and was not rebuilt. Thereafter, the Railroad Company conveyed to the then owners of the property whatever interest it had in the right of

(Testimony of David W. Agnew.)

way, the original right of way, that is, back to the owners of the property, who at a later date conveyed an easement to the Railroad Company for a right of way for a railroad as it is now constructed through the property.

Neither of the two deeds I just mentioned affected that part of the right of way which takes off from the main line and runs into what is now Camp Pendleton.

Mr. Dennis: That is all.

Mr. Shryock: Mr. Grover?

Mr. Grover: No questions.

Mr. Shryock: Thank you, Mr. Agnew.

(Witness excused.)

The Court: All right.

Mr. Shryock: If the court please, pursuant to a request made by Mr. Dennis on the second day of this trial, and pursuant to your Honor's direction, we have asked Mr. [729] Hall to return and to explain whether or not he has been able to obtain certain data requested by Mr. Dennis. For convenience, may I say that that appears at page 185 of the record.

Mr. Hall, will you please resume the witness stand.

H. M. HALL

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

The Clerk: It is H. M. Hall, is it not?

(Testimony of H. M. Hall.)

The Witness: Yes.

Q. (By Mr. Shryock): You realize, Mr. Hall, that are you still under oath? A. Yes, I do.

Q. I believe, Mr. Hall, that you were requested to get certain data for the years 1951 and 1952, respecting two specific wells on the Vail property, the so-called J.K. well and the Cantarini well. Will you explain what you did pursuant to that request?

A. I obtained the data as required for the J.K. pump, but the data was not available for the Cantarini pump, because of the nature of the well, and the fact that the pump completely fills the casing and there is no vacuum gauge installed for measuring the distance to the water. I, therefore, included in my work the same data for No. 30 pump, [730] which is in the central part of the valley, and for the Windmill well, which was the key well of the stipulated judgment. [731]

Q. In other words, because of your inability to get the data as to the Cantarini well you then obtained data from a representative additional well? A. Yes.

Q. Did you prepare any figures in connection with your study? A. I did.

Q. I now hand to Mr. Dennis and Mr. Grover copies of the figures which Mr. Hall prepared and I shall turn the witness over to Mr. Dennis for eliciting such information as he may wish.

#### Cross Examination

Q. (By Mr. Dennis): I wonder, Mr. Hall, if

(Testimony of H. M. Hall.)

you could locate those two wells on Plaintiff's Exhibit 32. I have it over here on the desk.

A. At the upper end of the valley I placed on this map previously a red triangle around a circle marked W.M., which is the Windmill Well in the tabulation.

Q. Is that an artesian well?

A. Nearly all wells in that area are artesian in the sense that the water plane rises somewhat when released but artesian wells doesn't mean that they flow. That well does occasionally flow but at very infrequent intervals.

Q. Would you locate Well No. 30? [732]

A. No. 30 is one of our main pumping wells which is near reservoir No. 3 in the central part of the main Pauba valley and is so designated on the map.

Q. Now, Mr. Hall, as I recall your testimony when you were on the stand before you stated that those wells which had a square were artesian wells and the ones with a circle were wells which were surface wells?

A. Yes, that is approximately true but——

Q. And perhaps I was mistaken but I was under the impression that the artesian wells were those wells which were drilled into the deep strata.

A. That is correct.

Q. Would that be true of the Windmill Well?

A. Yes.

Q. And these figures which are on the sheet of



(Testimony of H. M. Hall.)

paper which was handed to me by counsel for plaintiff are correct?

A. Yes.

Mr. Dennis: I think that is all.

Mr. Shryock: Mr. Grover?

Mr. Grover: Nothing.

Mr. Shryock: Thank you very much, Mr. Hall, and now, sir, the United States rests upon its case in chief as it relates to the defendant Santa Margarita Mutual Water Company and the defendant in intervention the State of California.

The Court: All right. [733]

Mr. Shryock: May I venture to express the gratitude of all of us for your Honor having been so considerate of the convenience of counsel and witnesses in this case?

The Court: All right.

Mr. Dennis: If your Honor please, I believe that in going over the transcript yesterday, that on page 594 at line 15, counsel's question in the transcript states 1,500 acres of Camp Pendleton leased out. I believe you meant 5,500 acres, did you not? I think that is what you said.

Mr. Shryock: Is that Mr. Taylor's testimony?

Mr. Dennis: Yes, and I think the record should probably be corrected.

Mr. Shryock: I believe that Mr. Dennis is correct, your Honor. I am certain that the figure was 5,500.

Mr. Grover: Your Honor, may I ask if this was introduced as an exhibit by number?

Mr. Shryock: It certainly was not by the plaintiff.

Mr. Grover: Is it going to be introduced?

The Court: Which is that?

Mr. Grover: This listing of Mr. Hall.

The Court: Well, he turned them over to you. If you want to introduce them you may.

Mr. Shryock: Mr. Dennis can do what he wants with them.

Mr. Grover: I just wanted to clarify that point. And was this map introduced by the plaintiff?

Mr. Shryock: That is Plaintiff's Exhibit 43.

The Court: The compilation of the wells was merely handed to you. If you want it in as an exhibit at the present time you may offer it.

Mr. Dennis: It is my understanding if I want to have it as an exhibit it will be necessary for me to put it in the record.

The Court: That is right.

Mr. Dennis: I don't know as yet until I have had a chance to study it whether it is going to be important or not.

The Court: All right, gentlemen.

Mr. Dennis: One other thing which I would like to ask the court at this time.

Under the terms of the pretrial order I was to supply the plaintiffs with copies of the Santa Margarita applications.

I supplied some photostatic copies and I was told that they wanted certified copies and Mr. Grover ordered them from the Division of Water Resources. When they came, however, I find that

they were photostatic copies of the Fallbrook Public Utility application in which I am not interested.

I don't know who is going to pay the bill to the blueprinting company, the state or myself.

In the meantime all of the records which the Division of Water Resources had, at my request on the Vail applications, the Fallbrook Public Utility District application and the [735] Government application and the Santa Margarita Mutual Water Company's applications were forwarded to Los Angeles.

However, at the time they were forwarded the instructions said that if any copies were to be made they were to be returned to Sacramento and the copies be made in Sacramento and the copies could not be made in Los Angeles.

It is the desire of the parties, I believe, at least the defendants, that the record of the Division of Water Resources be held in Los Angeles pending the trial of this action.

The Court: They haven't been turned over to us or to the clerk. When they are turned over to us I will make an order but we don't have them now.

Mr. Dennis: I am in this position, your Honor. I can get uncertified copies of the documents which I should have given to the Government. I am not in position to get them until they are returned.

I am wondering if they will accept copies that are uncertified from the Division of Water Resources.

Mr. Shryock: If they will be verbally certified

by Mr. Dennis we shall be happy to accept them.

The Court: All right.

Mr. Dennis: That brings me up to this. When we convene again I imagine we will go on with the case as far as the Santa Margarita Mutual Water Company is concerned and there is one question which bothers me considerably and that [736] is—it is my position that such rights as we may have to utilize and extract the waters of the Santa Margarita River will be such as may be granted under and pursuant to any permit which is issued by the Division of Water Resources of the State of California. They may in turn see fit not to issue such a permit. Our rights may be restricted under the terms of that permit.

It is my view of this case that it is not incumbent upon the defendant to establish whether or not the lands lying within the service area of the company and described in the applications are susceptible of profitable irrigation.

It seems to me that all this court is going to be called upon to decide is whether or not there are surplus waters, either temporarily or permanently, which are subject to appropriation, the extent of the riparian and the prescriptive rights of the United States Government and the relative priorities of the various applications to appropriate waters filed with the Division of Water Resources.

Naturally if at any time we are not putting the waters of the Santa Margarita River to beneficial use under such permit as might be issued to us by the State of California, they are then surplus



waters and any other appropriator or riparian owner has the use to such waters. However, if I am going to be required to prove the nature of the land lying within the service area and within the area for which the [737] water was appropriated it means that I am going to have additional witnesses and I would like to have some expression on that point at this time so that I can go ahead.

The Court: I will hear what Commander Shryock has to say. I have my own ideas on it but before I express them let us see what he has to say.

Mr. Shryock: I would prefer not to comment on that aspect of the case.

I believe that Mr. Dennis should determine what he requires to present his case.

The Court: All right. In view of that statement I will say this, that if the water is put to use, and as I read the cases, so far as an applicant who has not been granted a permit as yet, the only benefit that could be derived from a showing of adaptability of lands for a certain purpose would be in case there was a proportionment.

And appropriator has no correlative right as a riparian owner has and it would seem to me that in the condition in which your rights are that it isn't necessary for a determination of this lawsuit to determine what, if any, use you are going to put the water to as and when you get it.

Mr. Dennis: That is my position, your Honor, and further than that I think that that is a matter to be decided by the Division of Water Resources under the administrative provisions of the Code as

to whether or not our lands are [738] susceptible of irrigation. That is one of the things we are going to have to prove.

The Court: I think this. I don't want to give an opinion on an abstract question, but if there is a surplus, either temporary or permanent, it is no concern of ours who gets the surplus.

The Government has no interest in who gets the surplus if there is a surplus to which the Government is not entitled. It goes back to the sum total of the corpus of the water resources of the state, subject to be appropriated by others. So, I cannot see how the adaptability of your land for one purpose or another is material. And while I don't want to commit myself as to Fallbrook, because they are not represented here, either in person or by observers, I doubt if that would be an issue as to them and I certainly am not going to allow that inquiry unless I am convinced it has any bearing because the main point is this. They actually are diverting the water. They either have a right to divert it or they don't have such a right. If they have a right to divert it and put it to beneficial use it is no concern of ours.

Mr. Dennis: Just this one thought.

The Court: Except as to their riparian lands. I didn't think they had so much but you called my attention to it. My attention was called to it in the argument and the discussion in San Diego. You will notice when the opinion was [739] completed that I mentioned 400 acres with possible riparian rights. As to those a question of use might arise but again

as to those I don't think it is of great importance.

However, if this is an apportionment as between riparians I think it would be material whether it is actually being put to use because otherwise if it is not being put to use it is a part of the river and, of course, a riparian owner may use more than his share if the other riparians don't put it to beneficial use.

The Constitution modifies the famous or, rather, infamous case of *Hemminghouse* which held that even waste water you have a right to if they flow in front of you. I don't know who invented the simile. I think it was Judge Schenck in his dissent or maybe I did, but it is sometimes called the "rockingchair theory of riparian rights." They have a right to sit on the bank of the river and watch the river go by whether they use it for beneficial purposes or not.

Mr. Dennis: That is the *Hemminghouse* case?

The Court: Yes.

Mr. Dennis: I do think that your Honor is going to have to determine in this case what constitutes surplus waters.

The Court: That is right.

Mr. Dennis: And whether there are surplus waters and [740] if there are I think then you are going to have to determine as among the appropriators who have priority to those surplus waters.

The Court: That is right, but the use to which they put it is no concern of ours and cannot be covered by a decree.

Mr. Dennis: That is my understanding. I just wanted some verification.

The Court: That is my view of the law. And assuming that in the case of the Fallbrook Utility District, who are diverting water, the use to which they put it might become material but I don't think it will. It certainly is not as to you. You are not diverting any water. You have a paper right. I don't say that disparagingly.

The Government in this case is not going to claim anything by virtue of their appropriation. It wouldn't be much good to decide what would happen if your application is turned down. We will take that up when and if it happens.

Mr. Dennis: We felt we would be very foolish, your Honor, to spend a great deal of money to develop water and find we had no rights in the river. We feel they should remain simply paper rights until we have a decision.

There is one other thought which I wanted to express and get some opinion from counsel for the plaintiff on. The State of California has from time to time published rules and regulations and information pertaining to the appropriation [741] of water in California in which they set forth the allowances for domestic uses—what they consider to be a reasonable use.

Now if necessary we can bring Mr. Sandor or the other man who made the studies to determine what is a reasonable domestic use per gallon per day per person. However, we can save considerable time, I think, if we could enter into a stipulation



with the plaintiff that if Mr. Sandor was called he would say that this table, which is set forth on page 25, is correct to the best of his ability.

Mr. Shryock: May I inquire as to the nature of the publication to which you refer?

The Court: It is issued by the State of California. It is a state publication.

Mr. Shryock: If you are asking us whether we will agree that you may use that as a state publication, why, of course we will.

Mr. Dennis: Thank you.

The Court: As a matter of fact, Col. Robertson said that he was familiar with those standards.

Mr. Dennis: I believe he said he was not.

Mr. Shryock: Oh, to the contrary. I believe his Honor's recollection is correct. He stated he was familiar with them.

The Court: And also familiar with the other literature [742] on the subject, but he gave his own view that you cannot apply a general rule to a military establishment, for various reasons. He said some people don't wash at all, some people wash more often than others and it should be on the basis of a specialized development—I think he said like a high-class suburb.

Mr. Dennis: I apologize. I was mistaken. I understood Col. Robertson to say that——

The Court: Many a time the man who actually asks the questions does not get so vivid an impression of the testimony as the judge who just listens.

Mr. Dennis: Perhaps I would have asked some

other questions, and maybe Col. Robertson would have answered in the affirmative.

The Court: All right. Then it means you won't have to bring him back, and the stipulation may be formulated more definitely at the time you get ready to introduce your evidence.

Mr. Dennis: And I believe Mr. Henderson wants to furnish us with some information, too, and I believe that will be forthcoming.

The Court: That is right. That will be forthcoming, and if it is of a type that calls for explanation, he will be made available to you for that purpose, and you may call it additional cross examination, or whatever you want to call it in the record. This isn't the type of case in which that becomes important, because this is not a case where you will make a motion for a nonsuit, because a nonsuit does not lie. So it makes no difference if you close the case, because we can open it for any purpose necessary.

Mr. Dennis: Yes.

Mr. Shryock: If the Court please, one minor matter. May the record show that Mr. Swing is receiving a copy of the daily transcript, and will your Honor accept that statement, or must we swear Mrs. Zellner?

The Court: I don't think it is necessary. I understand [744] he is getting it.

Mr. Shryock: Is that correct, Mrs. Zellner?

The Reporter: That is right.

The Court: That does not become material at the present time. It may become material later on. It all

depends. I haven't told you, but I think of mechanics long in advance, and if, as and when Mr. Swing gets back into the case, and he will get back into the case at some stage, I will have certain suggestions to make in the interests of the economy of time, which I will not make at the present time, and in view of these undisclosed intentions of mine, the fact that he has a transcript may have some bearing on the matter. He has been receiving it right along.

Mr. Dennis: Commander, could we have a stipulation or agreement, too, that the table No. 6, consisting of seven sheets, which is entitled, "Well Drawdown and Static Level Data," which was supplied in answer to the demand in written interrogatories of the Santa Margarita Mutual Water Company, contains all of the information relative to drawdown and static water levels in the wells located in Chappo, Ysidora, and O'Neill Basin, of which you have any knowledge, and which are in the possession of the Office of Ground Water Resources, Post Maintenance or Public Works.

Mr. Shryock: The plaintiff so stipulates.

Mr. Dennis: All right. [745]

Mr. Shryock: Your Honor, may I ask something off the record?

The Court: Yes.

(Discussion off the record.)

The Court: All right, gentlemen, then the case will recess until Tuesday, November 18th, at 10:00 o'clock.

Thank you very much, gentlemen, for the manner and the temper in which you are conducting this

lawsuit. I said I hoped it would turn into a friendly lawsuit, and I think it has.

(Whereupon, at 12:30 o'clock p.m. an adjournment was taken until 10.00 o'clock a.m., Tuesday, November 18, 1952.) [746]

November 18, 1952, 10:00 o'clock a.m.

The Court: Cause on trial.

Mr. Shryock: If your Honor please, Mr. Dennis has very kindly consented that I might make a few clarifying observations.

The Court: All right.

Mr. Shryock: In the first place, on page 574 of volume 5 of the record reference is made to certain information which Mr. Henderson was to submit as supplementary information to Exhibit 42. Your Honor's first suggestion, that he compile it from his records in Portland, Oregon, and then permit us to submit it to Mr. Dennis, has been followed, and I now hand Mr. Dennis and Mr. Grover the information that Mr. Henderson undertook to obtain.

Secondly, if the Court please, I have been under the impression that Exhibit 14, which was the voluminous copy of the records of the United States Geological Survey runoffs at the various gauging stations, had contained a summary. We found later, however, that there were no summaries by years for those gauging stations.

We have, therefore, caused to be compiled the records by years from 1923-1924 down through the water year 1951-1952, showing the runoffs of the United States Geological Survey records at the six



gauging stations that have been [749] involved in this record. I have furnished copies of those to Mr. Dennis and Mr. Grover, and I should like very much to offer them in evidence as Plaintiff's Exhibit No. 44.

The Court: As a summary.

Mr. Shryock: As a summary, sir, of our Exhibit No. 14.

The Court: All right.

Mr. Dennis: I have no objection, your Honor. Your Honor, I think, further, could we have a stipulation that the amounts shown in the U.S.G.S. survey show the actual amounts of water that went past those stations, if those are the correct readings?

Mr. Shryock: I think that is what they purport to show.

(The documents referred to, marked Plaintiff's Exhibit No. 44, were received in evidence.)

Mr. Shryock: And, finally, if the Court please, since there is nothing in the record about it, I should like to make a brief statement, that following the hearing in San Diego on October 17th, at which the matter of access of the defendants' experts to the Camp Pendleton property was gone into some detail, I had a conference the next morning with General Smith, as a result of which he provided that the fullest access should be yielded to the defendants and their experts.

The following Monday I so notified counsel for the two defendants in the separate trial and the intervening defendant, [750] and pursuant to those notifications arrangements were made for the ex-

perts to visit the property, and they did, in fact, visit the property and were given what I believe was the fullest possible access.

The Court: All right.

Mr. Shryock: Thank you.

Mr. Dennis: Since that time, your Honor, no access has been denied the Santa Margarita Mutual Water Company's experts. However, as I understand, Mr. Caldwell today is attempting to get certain further information.

The Court: All right, gentlemen. As I understand now, you rest—the Government rests?

Mr. Shryock: Yes, sir.

The Court: Then Mr. Dennis will take up the laboring oar. [751]

\* \* \* \* \*

### ALLEN C. BOWEN

called as a witness by the defendant, having been previously sworn, resumed the stand and testified further as follows:

#### Direct Examination

Q. (By Mr. Dennis): Major Bowen, calling your attention to the map which is on the plywood sheet here, which was furnished the Santa Margarita Mutual Water Company in response to its demand for written interrogatories, is that a map which was furnished as map No. 1? [785]

A. It is.

Q. And that was prepared in the office of the Ground Water Resources under your supervision?

A. That is correct.

(Testimony of Allen C. Bowen.)

Q. Which would—I would now like to offer this map into evidence as Defendants' Exhibit A.

Mr. Shryock: No objection.

The Court: It may be received.

(The document referred to was marked Defendants' Exhibit A and received in evidence.)

Q. (By Mr. Dennis): Now, I believe, Major, that the various legends which are on this map are correct and that the legend in the left-hand corner designates the wells which are used for irrigation or camp supply, the unused domestic or stock wells and the wells which have been destroyed and which are located in the various basins and watersheds of the ranch as shown on the map, is that correct?

A. The legend on the map as placed there is correct.

Q. And I believe that the location of the military installations are more or less correctly shown on the map?

A. Up to the date of the compilation of the map they are correct.

Q. Now, Major, calling your attention to Plaintiff's Exhibit 22, a sheet which is designated Las Pulgas Canyon, I notice that bears in the right-hand corner, lower right-hand corner "restricted—Security information." Does that [786] mean this is a map which is not available generally to the public?

A. That is correct. It is available for military use only.

(Testimony of Allen C. Bowen.)

Q. And I notice that on this map there are various circles which have been colored solid in black and other circles which designate the location of the wells.

A. That is correct.

Q. And that there is a broken line which designates the location of the pipelines.

A. Standard pipe symbol to indicate the location of pipelines as constructed.

Q. And I notice that in the square or grid, which is numbered 6189 there is a shaded area.

A. That shaded area is included partly in grid 6189, 6190.

Q. And that portion of the shaded area which is shaded with horizontal lines indicate that that is construction which will commence in 1953?

A. I will have to refer to the legend on that. Your question referred to that cross-hatch in horizontal?

Q. Horizontal lines.

A. It is indicated on the legend "proposed construction in 1953."

Q. And that construction has not started yet, so far [787] as you know?

A. I am not certain as to whether that construction has been started yet or not because I am not familiar with the budget. There is a portion of that immediately adjoining which is cross-hatched in slant lines which indicates proposed construction in 1952.

Lt. Col. Robertson would be more qualified to



(Testimony of Allen C. Bowen.)

testify as to the phase of construction in which that area is presently engaged.

Q. Do you know of your own knowledge whether any men are stationed in that area at the present time?

A. In the area under construction, which is cross-hatched, no men are stationed because the construction is not completed.

Q. Now, Major, calling your attention to the sheet entitled "San Clemente Sheet," in Plaintiff's Exhibit 22, we find a similar shaded area in grids 5593, 5693, 5692, 5592, 5493.

A. Correct. [788]

Q. The testimony as to that location would be the same as it was to the property located in Las Pulgas Canyon? A. Yes.

Mr. Shryock: Let's have one thing clear here. When you say "stationed," Mr. Dennis, do you mean billeted?

Mr. Dennis: Billeted.

Mr. Shryock: Very well.

Q. (By Mr. Dennis): Now, I also find a similar shaded area in 4798, 4898, 4998, 4997, and 4897. To your knowledge, are there any men billeted in that area at the present time?

A. To my knowledge, there are none.

Q. Now, I believe that the areas as to which we have just referred lie or are situated in Las Pulgas Canyon, in San Mateo Canyon, and in Horno Canyon; is that correct?

A. No, that is not correct. The one to which we

(Testimony of Allen C. Bowen.)

first referred, on the Las Pulgas Canyon sheet, is in fact located in Las Pulgas Canyon. The one to which we referred secondly, located in grid square 5593, and adjacent grid squares, entitled "Camp Horno," is in fact located on the south fork of the San Onofre basin, and the one that we alluded to last, located in grid square 4898 and surrounding grid squares, is located adjacent to San Mateo Canyon, or within, I should say lying within San Mateo Canyon.

Q. Does San Mateo Canyon constitute a portion of the watershed of the Santa Margarita River?

A. It does not.

Q. Does Las Pulgas Canyon constitute a portion of the watershed of the Santa Margarita River?

A. It does not.

Q. Does San Onofre Canyon constitute a portion of the watershed of the Santa Margarita River?

A. It does not.

Q. Now, Major, calling your attention to Fallbrook sheet of Exhibit 22, we find a shaded area, shaded partially with horizontal lines and slant lines, lying in grids 6190, 6290, 6189, and 6289; does that lie in Las Pulgas Canyon? A. It does.

Q. Is that the same area which was referred to on the sheet entitled "Las Pulgas Canyon?"

A. That is the same area.

Q. Now, in grid squares 6584, 6585, 6685, there is a shaded area. Does that shaded area appear on either the Las Pulgas Canyon sheet or the San Clemente sheet?

(Testimony of Allen C. Bowen.)

A. That shaded area, marked "Camp Margarita," does not appear on either the San Clemente sheet, nor does it appear on the Las Pulgas Canyon sheet.

Q. Are any of the billets completed in that area?

A. To the best of my knowledge, they are not.

Q. Does that area lie within the Santa Margarita watershed? [790]

A. It does.

Q. Now, we find a square with slant lines in grid 7187—

Mr. Shryock: Of what sheet?

Q. (By Mr. Dennis): —of the Fallbrook sheet. Is that project now under construction?

A. That project is known as the Wherry housing site, and it is now under construction.

Q. And that is located within the watershed of the Santa Margarita River?

A. It is located within the watershed of the Santa Margarita River.

Q. Then, Major, you called my attention to the fact that I neglected to call your attention to a project which is in a square with slant lines, in grid square 6783. Is that project now under construction?

A. It has been about completed.

Q. Have any men been stationed or billeted there?

A. Yes, there are men presently being assigned to billets in that area.

Q. When were the first men assigned to that area?

A. I don't know.

(Testimony of Allen C. Bowen.)

Q. In the fall of this year, or, the late summer or fall of this year?

A. I don't know. I would have to check the record in [791] order to see when the first men were assigned to that Chappo Flat Barracks area.

Q. And that lies within the watershed of the Santa Margarita River? A. It does.

Q. Now, Major, I believe that in response to the request for written interrogatories of the Santa Margarita Mutual Water Company, certain tables were prepared which show the use of water by Camp Pendleton, the military installations; is that correct? A. That is right.

Q. Were they prepared under your supervision?

A. They were.

Q. In the Office of Ground Water Resources?

A. That is correct.

Q. Now, calling your attention to table No. 7, I think that is comprised of three sheets, is it not?

A. It is.

Q. I believe that the first sheet shows the monthly water consumption for Camp Joseph H. Pendleton.

A. That is the title of the first sheet of table No. 7.

Q. Now, as I understand, that table shows the total water consumed by months, from the period commencing with January, 1943, and terminating with April of 1942, which was [792] consumed by Camp Pendleton for military, domestic, agricultural, and recreational purposes from the Santa



(Testimony of Allen C. Bowen.)

Margarita River or the Camp Pendleton basin.

A. Would you read back those purposes again, please?

(The portion referred to was read.)

A. I am not certain whether the agricultural use was indicated on this table or not. I would have to check back on the question and the answer, the written answer to the interrogatories, to see what we purported to represent in this tabulation. Many of these tables were prepared with the military use separate from the agricultural use.

Q. Will you do that during the noon recess then, Major?      A. I will check that.

Q. Now, calling your attention to sheet 2 of table 7, which says, "Monthly Water Consumption, United States Naval Hospital, Camp Joseph H. Pendleton," was that table prepared also in your office?

A. That table was prepared in the Office of Ground Water Resources, under my direction and supervision.

Q. And that shows the amount of water consumed by the United States Naval Hospital for the period shown?      A. That does.

Q. Calling your attention to sheet No. 3 of table No. 7, which is entitled, "Monthly Water Consumption, United States Naval Ammunition Depot, Fallbrook," was that table [793] prepared under your direction?

A. That table was prepared under my direction and supervision.

(Testimony of Allen C. Bowen.)

Q. And it correctly sets forth the amount of water by months consumed by the Naval Ammunition Depot for the periods set forth?

A. That is correct.

Q. Now, Major, calling your attention to table 13, which consists of three sheets, and in particular to sheet one, which is entitled, "Agricultural Use of Water," does that table correctly set forth the amount of water consumed for agricultural purposes, which was extracted from the Santa Margarita River and the Pendleton basin, referring to the Pendleton basin as the three basins which you have referred to heretofore?

A. Table 13, in answer to interrogatories posed by the Santa Margarita Mutual Water Company, sheet 1 of three shows the agricultural use of water, and does represent that amount extracted from the Santa Margarita basin for agricultural use on Camp Joseph H. Pendleton.

Q. And that would be both within and without the watershed?

A. That is correct.

Q. Calling your attention to sheet 2, which is entitled, "Military Use of Water for the Period Commencing [794] with January, 1943, and Terminating May, 1942," does that correctly set forth the water which was used for military uses by Camp Pendleton, that was extracted from the Santa Margarita basin or from the Santa Margarita River?

A. Sheet 2 of three of table No. 13, in answer to interrogatories posed by the Santa Margarita Mutual Water Company, does show the military use

(Testimony of Allen C. Bowen.)

of water for Camp Pendleton, the U. S. Naval Hospital, and the U. S. Naval Ammunition Depot, for the period of January, 1943, to May of 1942.

Q. And that water was all produced or extracted from the Pendleton basin or the Santa Margarita basin?

A. That is correct.

Q. And that represents all of the water which was consumed for military purposes by Camp Pendleton within the——

A. That is all of the water extracted from the Santa Margarita basin for use by these military installations, Camp Pendleton, Naval Hospital, and U. S. Naval Ammunition Depot.

Q. Well, these installations to which this water was supplied, did they have available any other source of water, other than derived from the Santa Margarita watershed?

A. Yes, indeed. Camp Pendleton has available water from several other sources besides the Santa Margarita River.

Q. Now, let's refer to Plaintiff's Exhibit 22, and I [795] will ask you, Major, if any portion of the Camp Pendleton installations situated in areas 25, 12, 14, 11, 24, 13, 15, 17, 16, 23, 22, 21, and 31 were supplied with water from any source other than from that obtained from the watershed of the Santa Margarita River.

A. Well, there was no significant amount of water furnished any of those areas you named, Mr. Dennis. We have some small, what we might call stock water ponds, which do furnish local amounts

(Testimony of Allen C. Bowen.)

of water, but the bulk of the water for those areas was furnished from the Santa Margarita River.

Q. Now, Major, calling your attention to sheet 3 of table No. 13, which is the monthly water consumption for Homoja Housing, does that correctly state the amount of water which was consumed at that housing project?

A. The records as shown on sheet 3 of table No. 13 in answer to interrogatories proposed by the Santa Margarita Water Company does show correctly the monthly water consumption for Homoja Housing.

Q. And that water was all derived from the Santa Margarita watershed?

A. That is correct.

Mr. Dennis: I would like to offer table 13, consisting of two sheets, in evidence as Defendants' Exhibit B.

Mr. Shryock: No objection.

The Witness: Consisting of three sheets.

Mr. Dennis: I beg your pardon, it should be three sheets.

Mr. Shryock: No objection.

The Court: It may be received.

(The documents referred to were marked Defendants' Exhibit B and received in evidence.)

Q. (By Mr. Dennis): Now, calling your attention, Major, to table No. 22, which was explained or strike that. That was supplied in answer to a demand for written interrogatories of the Santa Margarita Mutual Water Company. Was that pre-



(Testimony of Allen C. Bowen.)

pared in your office and under your supervision?

A. It was.

Q. And does it correctly state the amount of water which was used on the golf course at Camp Pendleton?

A. It correctly states the amount of water used on the golf course according to our best estimate.

Mr. Dennis: I would like to offer this in evidence as Defendants' Exhibit C.

Mr. Shryock: No objection.

The Court: It will be received.

(The document referred to was marked Defendants' Exhibit C and received in evidence.)

Q. (By Mr. Dennis): And Major, could you give us the approximate location of the golf course on Defendants' Exhibit A?

A. The golf course on Defendants' Exhibit A, if I may approach the map——

The Court: Certainly.

A. Appears in the bottom of Windmill Canyon. The club house, which would be about midway along the extremities of the golf course, is located on Defendants' Exhibit A in the Northwest Quarter of Section 32, Township 10 South, Range 4 West, San Bernardino base line and meridian.

Q. Windmill Canyon does not constitute a portion of the watershed of the Santa Margarita River?

A. It does not. [798]

Q. You will check at the noon recess the figures on page 1 of table 7?

A. I will be very glad to.

(Testimony of Allen C. Bowen.)

Mr. Shryock: What was that question?

Mr. Dennis: He will check on his figures on page 1 of table 7.

Mr. Shryock: That is the one you asked about before?

Mr. Dennis: That is correct.

Q. (By Mr. Dennis): Now, Major, the area which is known as the Naval Ammunition Depot which is comprised of 9,147 acres, is shown on Defendants' Exhibit A by a dotted line or dashed line above which appears "Naval Reservation." Would you care to inspect the map?

A. The boundary symbol delimiting the use of the Naval Ammunition Depot at Fallbrook as shown on Defendants' Exhibit A, is a dash-dot symbol and in the lower right-hand corner of that reservation appears over the boundaries "Naval Reservation" and within the area it shows—it is written "Fallbrook Naval Reservation."

Q. And, Major, before you leave, a portion of the watershed of the Santa Margarita River embraces 35 and portions of 36 of Township 9 South, Range 4 West, does it not?

A. And referring to the DeLuz watershed as shown on Defendants' Exhibit A, you include those portions of the property which constitute the portion of the Naval Reservation or Camp Pendleton which lie without the exterior boundary lines of the Santa Margarita grant, do you not?

A. Yes. We include all of the acquisitions by the Government for the Camp Pendleton reserva-

(Testimony of Allen C. Bowen.)

tion. However, the boundary line as indicated on Defendants' Exhibit A is not quite correct. It was correct to the best of our information at the time the map was prepared but there are some minor differences which are indicated on Plaintiff's Exhibit No. 22.

Q. Were those questions made on Plaintiff's Exhibit 23 and on Plaintiff's Exhibit 24?

A. May I see the exhibit, please?

The Court: He cannot visualize them, Mr. Dennis. Show them to him.

Q. (By Mr. Dennis): I will hand you my copy of Exhibit 24 and ask you if the watershed boundary as shown on that map includes all of the properties which comprise the United States Naval Ammunition Depot and Camp Joseph H. Pendleton which lie within the watershed of the Santa Margarita River?

A. There again on the northerly boundary the irregular area which was not part of the original Rancho Santa Margarita grant, there are some minor changes which have not been incorporated in this Exhibit No. 24.

Q. Major, calling your attention to Exhibit 23 and Exhibit 24, the watershed of the Santa Margarita River as depicted on those two exhibits, include all the properties [800] owned by the plaintiff including properties which were not a portion of the original Santa Margarita grant?

A. Exhibit 24 was prepared originally by trac-

(Testimony of Allen C. Bowen.)

ing the original of Plaintiff's Exhibit 22 so the boundaries must of necessity coincide.

Q. And they include properties which were not a portion of the original Santa Margarita grant?

A. That is correct.

The Court: Is this a good place to stop, Mr. Dennis?

Mr. Dennis: Yes.

The Court: All right, 2:00 o'clock.

(Whereupon, at 12:10 o'clock p.m. a recess was had until 2:00 o'clock p.m. of the same day.) [801]

November 18, 1952, 2:00 o'clock p.m.

The Court: I am sorry, gentlemen, I was delayed, but, as you know, I have so many administrative details to attend to. I spent practically all day yesterday trying to clean things up, but a lot of things happen when you are away. If you had seen my desk when I got in this morning, you would not realize I had been gone only two working days. It looked as though I had been away for a month, and I haven't been able to dig my way out, although I am beginning to see light. So I had to take this time to do some dictation on a matter I had under submission.

You may proceed.

Mr. Dennis: Major Bowen.

ALLEN C. BOWEN

resumed the stand as a witness on behalf of defendants and, having been previously duly sworn, testified further as follows:



(Testimony of Allen C. Bowen.)

Direct Examination—(Continued)

Q. (By Mr. Dennis): Major, during the noon recess did you have an opportunity to inspect the figures which appear on sheet 1 of table 7, which was given in response to the written interrogatories of the Santa Margarita Mutual Water Company?

A. I did. [802]

Q. And are you prepared to say at this time what the figures represent?

A. The figures on sheet 1 of table No. 7, supplied in answer to interrogatories of the Santa Margarita Mutual Water Company, show the monthly water consumption for Camp Joseph H. Pendleton from the year, January, 1943, until April, 1952, inclusive. That table shows, in response to the interrogatory, all of the use, including agricultural use.

Q. That would be the entire demands of the camp on the Santa Margarita River for that period?

A. That is correct.

Mr. Dennis: I would like to offer in evidence, then, as Defendants' Exhibit D, table 7, consisting of three sheets.

Mr. Shryock: No objection.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: That is Defendants' Exhibit D in evidence.

(The document referred to, marked Defendants' Exhibit D, was received in evidence.)

Q. (By Mr. Dennis): Now, Major, calling your

(Testimony of Allen C. Bowen.)

attention to table No. 1, which was given in response to the demand for answers to written interrogatories, I notice two figures opposite De Luz Creek and Fallbrook Creek. I believe they represent the number of acres within the watershed of that creek within the boundaries of the Naval Ammunition Depot. [803]

A. The numbers indicated——

Q. I mean Camp Pendleton.

A. The numbers indicated in table No. 1, supplied in answer to interrogatories by the Santa Margarita Mutual Water Company, show the acreage of De Luz Creek and the acreage of Fallbrook Creek which are included within the exterior boundaries of the Naval Reservation.

Q. And could you give me the number of acres within the watershed of Fallbrook Creek?

A. Fallbrook Creek has 3,798.9 acres lying within the Naval Reservation, United States Naval Ammunition Depot, and the Camp Pendleton Reservation.

Q. Could you give me the number of acres lying within the watershed of De Luz Creek?

A. The acreage for De Luz Creek is 6,869.6, all of which lies within the exterior boundaries of Camp Pendleton. [804]

Q. Now, Major, I wish to call your attention to a map which is titled "Land Utilization Map" and ask you if that is a copy of the tracing which you used to reproduce or produce Plaintiff's Exhibit 23, I believe it is—Plaintiff's Exhibit 24?

(Testimony of Allen C. Bowen.)

A. Yes. This is a print from the original tracing introduced into evidence as Plaintiff's Exhibit No. 24.

Q. And since obtaining that from you I have had the acreage, which is shown on that map as irrigated, pasture, colored in green. And the acreage would could be devoted to row crops in brown. The acreage devoted to avocados in blue and the acreage in citrus a green and blue area.

You have had an opportunity to examine the map and would you say that the colorings are substantially correct?

A. With one minor detail which struck my eye at the present moment. The area in the lower left-hand corner of this copy of Exhibit 24 which is colored in as citrus is larger than—correction.

Q. It is substantially correct, is it not?

A. It is substantially correct.

Mr. Dennis: I would like to introduce this map in evidence then as Defendants' Exhibit E.

The Court: It will be received.

(The document referred to was marked Defendants' Exhibit E and received in evidence.)

Mr. Shryock: May I say at this time, just so there is no confusion, that the Defendants' Exhibits A through E so far have no relation to the Defendants' Exhibits as they were recited in the pretrial order.

I say that because there were 35 exhibits recited as being the plaintiff's exhibits in the pretrial order and they in fact are the first 35 exhibits of the

(Testimony of Allen C. Bowen.)

plaintiff. But these lettered exhibits which have been offered today have no relation to those mentioned in the pretrial order.

Mr. Dennis: That is correct, yes.

The Court: All right.

Q. (By Mr. Dennis): Now, Major, calling your attention to Defendants' Exhibit E, as to the properties which lie within the boundaries of the United States Naval Reservation or United States Naval Ammunition Depot, did you anticipate that those properties would obtain water to irrigate the pasture acreage, avocado land and row crop acreage—where did you anticipate that water would come from?

A. I anticipated that the water would be obtained from the Santa Margarita River, those lands lying within the watershed of the Santa Margarita and being riparian thereto.

Q. What portion—where would the point of diversion be, Major?

A. Well, I have not made any detailed investigation as to a diversion point. It would be entirely feasible, however, [806] to construct a diversion in there and lift water to the surface of the—Fallbrook surface upon which those irrigable lands largely lie.

Q. Well, during the summer months when those—when the needs of the land for irrigation would be the greatest that water would have to be extracted from the Pendleton basin, would it not, or Santa Margarita basin?



(Testimony of Allen C. Bowen.)

A. Without any surface storage that would be the only present supply of water.

Q. That is the water cycle or seasonal storage. You would have to divert those waters from the basin?

A. That is correct.

Q. And as to all of the lands which are lying approximately north of the line which represents the southern boundary of the United States Naval Ammunition Depot as extended, would have to be obtained from the same source, would it not?

A. Are you referring to the section line indicated on the map? That would be the bottom section line of the tier of sections lying in Township 10 South?

Q. The northerly tier, yes, in 10 South.

A. And your question was that the irrigable land lying north of that section line?

Q. Would have to obtain their water during the summer months from the Pendleton or Santa Margarita basin?

A. That is right. And the base, of course, projects up [807] into those irrigable lands. In fact it runs on an air line better than three miles north of that line.

Q. Into which lands now?

A. (No answer.)

Q. Which lands?

A. In those irrigable lands north of that section line that was indicated in the previous statement.

Q. Well, now, Major, the limit surface area of the base is correctly shown on Plaintiff's Exhibit A, is it not?

A. (No answer.)

(Testimony of Allen C. Bowen.)

Q. On Defendants' Exhibit A?

A. I believe that that is the area delimited on Defendants' Exhibit A and was for another purpose than showing the area of the underground basin, Plaintiff's Exhibit No. 10, a map showing the lower Santa Margarita River Valley prepared by the U.S.G.S. which delimits the surface area of the underground basin lying within the camp.

Q. Now, Major, calling your attention to Plaintiff's Exhibit No. 10, the portion of the basin to which you alluded is this narrow strip of land which starts approximately even with the northerly end of Lake O'Neill and extends approximately a mile northerly to a point signified as the De Luz Dam site?

A. Your original question was with reference to this line marking the southern boundary of the northerly tier of sections in Township 10 South, and I stated that the underground basin ran approximately three miles north of that line. Mr. Worts in his testimony indicated that for practical purposes, or for purposes of operating the basin, they had arbitrarily drawn the upper limit of the basin, or the northerly limit of the basin, at the proposed De Luz Dam site, because, I believe his statement brought out, the dam, if constructed, would cover the portion of the basin lying upstream from that. But the basin itself, as shown on the profile of the Santa Margarita-Temecula River, submitted as Plaintiff's Exhibit No. 9, reveals that

(Testimony of Allen C. Bowen.)

a wedge of alluvium exists considerably upstream from the site of the proposed De Luz Dam, which alluvium, in effect, is a part of the Santa Margarita basin.

Q. Well, you would say, though, that the width of the basin to which you are referring is correctly shown on Plaintiff's Exhibit No. 10, would you not?

A. That is correct.

Q. And Plaintiff's Exhibit No. 9 was the geologic cross-section AA?

A. Of the Temecula-Santa Margarita River, yes.

Q. Now, Major, it is a fact, is it not, that the irrigated pasture is a perennial crop and that it has to be irrigated during the summer season and has to be maintained year in and year out—an irrigated pasture is not an annual crop?

A. No, the definition of an irrigated pasture connotes a perennial type of forage.

Q. And most of the irrigation will take place during the summer months, or during the dry season?

A. That is the customary irrigation season for this part of the country.

Q. And the only reason for maintaining irrigated pasture would be for the pasturing of livestock, horses, sheep, and cattle, substantially?

A. That is the way that an irrigated pasture is customarily harvested.

Q. Have you made any effort to determine the number of head of cattle which an irrigated pasture

(Testimony of Allen C. Bowen.)

in the Santa Margarita River watershed in San Diego County will maintain?

A. A good irrigated pasture ordinarily can carry about, oh, two and one-half animal units, I would say.

Q. Per acre? [810]                      A. Per acre.

Q. And it would be necessary to fence the pasture, would it not?

A. Well, in order to get the optimum use of any pasture, a fencing system must be devised.

Q. It would be necessary to devise a fencing system, to keep the cattle from wandering over into the area cultivated for row crops?

A. Certainly, it is necessary to devise a fencing system, but it can be of a temporary nature, such as a single strand of charged wire, to keep the cattle from encroaching into other areas.

Q. In your opinion, would a single strand of charged wire keep the cattle from encroaching into other areas?

A. By and large, they have been found to have retained cattle within the boundaries of a pasture in that way.

Q. That is your opinion?

A. That is my opinion, and my observation.

Q. Have you made any effort to determine the cost of fencing the various tracts of land you determined to be used for irrigated pasture, and the cost of extending a pipe line to that property?

A. I have made no estimates of the cost of fencing, because, as stated, a temporary type re-



(Testimony of Allen C. Bowen.)

straint, which would cost very little, could be used, and of recent years I have [811] had no cause to build any fence, and the present costs of material and labor are beyond my knowledge, so I wouldn't be qualified to state how much per unit length the cost to build a fence would be.

Q. The same would apply to the cost of construction of a pipe line to the irrigated pasture?

A. I have made no estimate of the cost of a water-distribution system in this area.

Q. Did you make any investigation as to the cost of clearing that land?

A. Well, the cost of clearing would be nominal. The land could be treated as other similar lands in the area are treated. It is a commonly accepted practice in this part of the State to clear brush and subsoil land, and so forth, in preparation for irrigation. It would be the same in this area as it would be in similar adjoining areas.

Q. Also, it would be necessary to level it?

A. No, absolutely not. It would not be necessary to level it. You know, in your own service area over there, there are many rolling, hilly, irrigated pastures, some of which occupy rather steep lands, and which seem to be producing a satisfactory yield.

Q. They were all leveled, were they not, prior to the time that the grasses were planted?

A. No, they weren't leveled. Do you mean by "leveled," [812] leveling to grade stakes?

Q. No.

(Testimony of Allen C. Bowen.)

A. There has been practically none of that accomplished in this area.

Q. Not to grade stakes, just that the contour of the land has to be smooth, the rocks removed, and so forth.

A. You mean, does the seed bed have to be prepared? Is that what you mean?

Q. Yes, the seed bed prepared.

A. No, you prepare a seed bed to put the pasture mix in, certainly. It does not mean leveling. That is a misnomer. That usually connotes preparing grade stakes and moving earth with very heavy equipment.

Q. You didn't take that into consideration when you said the lands were to be used for irrigated pasture?

A. I certainly did. This land is no different than other lands subjugated to irrigation.

Q. Did you take the cost into consideration?

A. Well, it was hardly necessary to figure actual costs, because it is comparable to other areas in the locality which are being successfully developed for irrigation. Hence, we might infer that private owners are developing lands for irrigation, and this land being similar, therefore, could be so developed.

Q. Now, Major, calling your attention to this area [813] of irrigated pasture land located at the Ammunition Depot, which has a total area of 2,725.7 acres, and, in particular, calling your atten-

(Testimony of Allen C. Bowen.)

tion to the northeast corner of that plot, have you any idea of the elevation of that land?

A. Well, I did at the time that I drew up this proposed land-utilization plan, but I would have to compare this with a topographic map in order to give you the elevation. [814]

Q. Well, in connection with the preparation of your testimony and your charts and graphs and that map, and that that land was adaptable to irrigated pasture, did you take into consideration the expense of lifting water from the Pendleton basin to that particular tract or parcel of land?

A. No. As I say, I didn't take those factors into consideration because that area adjoins the Fallbrook Public Utility District which has been successfully irrigated by pumping water to rather high lifts for a number of years.

Q. Do you know any ground in the limits of the Fallbrook Public Utility District that is being devoted to irrigated pasture?

A. I can't of my own knowledge state that because I haven't made that detailed survey of the Fallbrook Public Utility District.

Q. Well, at no time have you had your attention called to any land within the limits of the Fallbrook Public Utility District which has been devoted to irrigated pasture or being used as irrigated pasture?

A. Well, I can't recall at any time having my attention called to any land in the Fallbrook Pub-

(Testimony of Allen C. Bowen.)

lie Utility District because I had no occasion to make surveys in there.

Q. So in connection with the preparation of your charts and tables you did not take into consideration either the cost of pumping water on the ground or the cost of preparing that [815] ground for irrigated pasture?

A. Only by inference. Those lands, as I say, are similar to other lands in this particular area, which have been subjugated to irrigation and I believe it is a proper assumption if private owners can develop similar lands for irrigated agriculture that these lands similarly situated can also be developed for irrigated agriculture.

Q. Major, do you know of any lands in this area or in the watershed of the Santa Margarita River or within the watershed of the San Luis Rey River that are being devoted or used for irrigated pasture where the owner has a lift of more than 200 feet?

A. Well, I might point out to you that on the upper limit of this we have indicated or, I have indicated, that the land is suitable for the production of avocados and in between that irrigated pasture or surrounded partially by that irrigated pasture area which you have pointed out to me, is an area adapted to row crops. And as you and I both know the returns from avocados or row crops is very high and we would be justified in pumping water up there for their use and at the same time that we were pumping water for the irrigation of



(Testimony of Allen C. Bowen.)

avocados and row crops it would cost us very little more to extend our distribution system to irrigate the pasture acreage that is in the vicinity.

Q. Major, do you know that the cost is approximately [816] \$5 an acre-foot to lift water 100 feet in this area, do you not?

A. I have had no occasion to examine any power costs in this area.

Q. Well, coming back to my question that I asked you a few moments ago.

The Court: What is the object of this testimony? To show economic feasibility?

Mr. Dennis: Economic feasibility, that is right. I am not going to pursue this much longer, your Honor, but I do have one or two more questions.

The Court: All right.

Q. (By Mr. Dennis): Major, will you answer my question that I asked several minutes ago and that is do you know of any area within the San Luis Rey watershed or Santa Margarita River watershed in San Diego County that is devoted to the use of irrigated pasture where there is a lift of more than 200 feet?

A. Well, I can't state certainly in regards to that, Mr. Dennis, because I have again not made the detailed survey but my observation say of Pauma Valley in the San Luis Rey watershed indicates that water is being lifted from 450 to 500 feet for the purpose of irrigation. And as I recall some of that land that is not suitable for avocados,

(Testimony of Allen C. Bowen.)

heavier land with a more gently sloping area, is being irrigated as pasture [817] land.

Now, I can't state of a certainty whether it is more or less than 200 feet above the point of diversion on the San Luis Rey River.

Q. Well, at those points on the San Luis Rey River, they would have an elevation of two or three hundred feet above sea level, would they not?

A. Well, there again I would have to consult a topographic map in order to check those figures.

Q. Well, in the preparation of your tables you did not take those elements into consideration?

A. The elevations of the land?

Q. The elevation of the land, the cost of raising water, the cost of fencing, the cost of piping, the cost of clearing and cost of planting.

A. In a general way, yes, but no specific or detailed studies were made of those elements.

Q. Now, I believe that you testified that the crops which you would expect, row crops which you would expect to raise on these areas which have been colored in brown, would be substantially the same type of crops which have been raised on the Stuart Mesa and South Coast Mesa in the past and the same type of row crops that Mr. Vail would raise on his property, is that correct?

A. Well, that is correct. I think that your statement [818] embraces about all of the crops generally adapted to this area. I certainly wouldn't want to limit it to crops which have been grown, which

(Testimony of Allen C. Bowen.)

otherwise might very well be adapted—might be introduced.

Q. And as I understand the different crops require a different duty of water. For instance celery will require more water than radishes or potatoes, perhaps, or corn?

A. That is right. Celery requires considerably more water than radishes.

Q. And you would expect in this area and in particular those parcels which you have shown as being adapted to row crops, that you would probably raise radishes, potatoes, corn, cauliflower, cabbages, tomatoes, peppers, parsley, is that correct?

A. Well, row crops is an all-inclusive term. It would include as what we generally consider field crops, such as sugar beets.

Q. And the duty of water for sugar beets would be comparably much less than that for, we will say, celery.

A. No, it would be comparable. The duty of water for each of these crops, of course, will vary but through a system of rotation and diversification of farming, why, the water duty ascribed to row crops of four acre-feet per annum would be about right.

Q. In accordance with the approved practices you would [819] expect the row crops to be rotated? You wouldn't plant tomatoes year after year or potatoes year after year? You would rotate your crops?

A. That is correct. That is found to be the most

(Testimony of Allen C. Bowen.)

acceptable practice. You probably would even put, say, alfalfa in down there from time to time. I made no attempt to work out a rotation, but alfalfa would take about the same amount of water, a little less there, than row crops, so it seemed for the purposes of establishing duty of water it was not necessary to develop a rotation over a period of years.

Q. Now, Major, calling your attention to Plaintiff's Exhibit 25-A. I notice that on each one of the various sheets which constitute a portion of that exhibit, that there has been a blue line or a dash with three dots interspersed in various places on the map or photostat. Did you have that superimposed?

A. This is Plaintiff's Exhibit 25-A. It is the actual field sheet and the entries made on here are all made in ink. The dashed, the blue line with the dash and three dots is the standard symbol for an intermittent stream.

Q. And were those blue lines superimposed on this map under your direction.

A. Those blue lines were. All lines were drawn on this map under my direction including the blue lines.

Q. Calling your attention to sheet—I wonder if you can tell me how to designate this particular sheet? 400/17? [820]

A. That is correct.

Q. In the southerly portion of the area designated on that sheet and just opposite C623D2 I



(Testimony of Allen C. Bowen.)

see a line which designates that there is an intermittent stream in that particular locality?

A. That is correct.

Q. Have you ever seen water flowing on the surface of the ground in that particular locality?

A. Well, as a matter of fact I haven't had an opportunity to get around to all of these intermittent stream channels during periods of high precipitation when one might expect water to flow through them, so I can't state with safety whether I have ever seen water flow in a minor tributary such as you have just pointed out or not.

Q. So that you are not in a position to testify of your own knowledge whether or not there are intermittent streams in the various locations on Plaintiff's Exhibit 28 that are designated by this dot and dash line?

Mr. Shryock: 25.

Mr. Dennis: 25-A.

The Witness: I certainly am in a position because the stream occupies the lower portion of a small drainage area and any water that fell on that and ran out would naturally have to flow to the lowest part of the drainage area and thence travel down that to the next main stream. [821]

Q. In other words, these intermittent streams are placed in the thread of all barancas or channels which you figure there might be a run-off of water on the surface?

A. Well, as a matter of fact we didn't place the symbol on every channel or thread or baranca, if

(Testimony of Allen C. Bowen.)

you please, because they are multitudinous. You could carry it to the ultimate extreme and even up to a grain of sand at the top of the hill, which grain of sand would split a drop of water, a portion of which water would go on one side of the grain of sand and a portion of the water would go on the other side of the grain of sand, so by and large these intermittent stream symbols are drawn in here to convey the impression of the drainage area or the drainage system and doesn't purport to symbolize every channel which has been etched on the surface of the ground by erosion.

Q. And it doesn't purport to show that there is actually a surface stream at that point?

A. It purports to show that when there is sufficient run-off water will collect in that channel and run downstream.

Q. Have you ever seen any water in any of those channels?

A. Certainly I have seen water in some of those channels.

Q. But the majority of them?

A. Well, unfortunately we have, as you know, had a drought from 1944 until 1951 and there was little, if any [822] opportunity to observe water flowing in any of these channels.

Last year, the period during which run-off occurred, was so short that it would have been a virtual impossibility for me to inspect each of those channels to see if water was flowing through

(Testimony of Allen C. Bowen.)

it. But I can testify that water can and at times does flow through each one of those channels.

Q. You wouldn't expect to find any water flowing through channels through the dry season of the year?

A. No, I certainly wouldn't, not unless we had an unseasonal rain.

Q. Now, Major, calling your attention to Plaintiff's Exhibit 22 and in particular to the table which is attached to the Las Pulgas Canyon sheet, sewage effluent discharge for the years 1943 to 1952, do you know of your own knowledge whether the sewage discharge from Camp Pendleton plant No. 1 is returned to the Pendleton basin?

A. Yes; at the present time the sewage effluent discharged from Camp Pendleton sewage disposal plant No. 1 is returned to the Santa Margarita River watershed.

Q. Is that true for Camp Pendleton plant No. 2?

A. That is true for Camp Pendleton sewage disposal plant No. 2.

Q. And for Camp Pendleton No. 3?

A. No. 3 has always been discharging into the Santa Margarita River. [823]

Q. And Camp Del Mar, plants No. 4, 5 and 6, is discharged into the Pacific Ocean?

A. That is correct.

Q. Now, calling your attention to the Ocean-side sheet. I notice the shaded or hatched portion line just west of the highway. Does that represent any proposed development at the present time?

(Testimony of Allen C. Bowen.)

A. The cross-hatched area in black which is indicated on the legend, is proposed construction in 1952 lying in the Del Mar area and generally west of U.S. Highway 101. That was placed there in error. It actually should be up in the area shown as the infantry training center in grid square 6476 and 6475.

Q. And that is the proposed trailer camp to which Col. Robertson testified at the time he gave his testimony?

A. That is correct. [824]

Q. Now, Major, showing you Plaintiff's Exhibits 26 and 27 and Defendants' Exhibit D, the total of 26 and 27 for the month of March, 1943, should be the same as the figure which appears on Defendants' Exhibit D for the same period, should it not? In other words, does the total of the figures for each month of the year on 26 and 27 represent the same use as that which appears on Defendants' Exhibit D, sheet 1?

A. The plaintiff's exhibit, referring to Plaintiff's Exhibit 26, shows for March of 1943 the figure of 250 acre-feet. Plaintiff's Exhibit No. 27, for the same month, March of 1943, shows 66 acre-feet. Defendants' Exhibit D, which includes three tabulations, shows on sheet No. 1 for the month of March, 1943, 66.19. Sheet No. 2 of three of Defendants' Exhibit D shows nothing for March of 1943. The records did not go back that far. They began in October of 1944. Sheet No. 3 of Defendants' Exhibit D shows nothing for the month of March. The records began in 1946.



(Testimony of Allen C. Bowen.)

That 66 acre-feet agrees with the entry for March on Plaintiff's Exhibit No. 27.

Q. I don't think that I made myself clear, Major. The total of the figures for each month in Exhibits 26 and 27 represents the same quantity of water which is represented on table 7, sheet 1, which is Defendants' Exhibit D; is that correct.

A. Substantially correct. [825]

Q. Now, when you say "substantially," are there any modifications that should be made in that statement? What I am trying to find out, Major, if there is any use of water from the Santa Margarita watershed that was made by the Naval Reservation, which is not shown on sheet 1 of table 7, which is Defendants' Exhibit D.

A. Well, it is possible that there may be some differences between Plaintiff's Exhibits 26 and 27 and Defendants' Exhibit D, because they were prepared at different times and under different circumstances. I would have to check back on my original compilations for these tables in order to ameliorate any differences which exist there.

Q. But they do represent the same use of water?

A. They indicate the same use of water, that is correct.

Q. Now, Major, calling your attention to sheet 1 of table 7, Defendants' Exhibit D, that shows that the Naval Ammunition Depot consumed 5,890.10 acre-feet for the calendar year 1950, did it not—or, 1951?

A. Sheet 1 shows the monthly water consump-

(Testimony of Allen C. Bowen.)

tion of Camp Joseph H. Pendleton. That is sheet 1 of Defendants' Exhibit D. I believe you mentioned the Naval Ammunition Depot.

Mr. Shryock: He did.

Q. (By Mr. Dennis): Then this is exclusive of the United States Naval Ammunition Depot? [826]

A. Well, the three sheets here give the United States Naval Hospital and the United States Ammunition Depot separately from Camp Pendleton, and the three tabulations represent Defendants' Exhibit D.

Q. And the total for that year is approximately six thousand-odd acre-feet, is it not, for 1951?

A. The total for 1951 would be upwards of six thousand, I believe.

Q. And that represents all of the water which was used for agricultural, military, and recreational purposes?

A. All that was pumped out of the wells.

Q. Or diverted from the river?

A. Or diverted from the river.

Q. Now, calling your attention, Major, to Plaintiff's Exhibit No. 40, I notice for the year 1951 you show a total acre-feet of water utilized, both within and without the watershed of the Santa Margarita River, of 10,258 feet. How do you account for the discrepancy between the two figures?

A. The figures which are represented in Defendants' Exhibit D and in Plaintiff's Exhibits 26 and 27 I believe merely show the water as metered from the wells.

(Testimony of Allen C. Bowen.)

Plaintiff's Exhibit No. 40 shows that same figure, and adds to it the water which is withdrawn from the underground basin for the forage growing on the surface of that basin.

The figure ascribed to that, as represented in my testimony [827] for the plaintiff, was considered to be conservatively one acre-foot per acre per year, a direct withdrawal from the basin for the forage growing on the surface.

The basin area is approximately 4,535.3. I believe I said in my previous testimony it was in excess of four thousand, and using, or ascribing a use of an acre-foot per acre per year, withdrawal by the plants from the underground basin, that figure of approximately 4,500 acre-feet per year was added to column No. 2 on Plaintiff's Exhibit No. 40, which shows the quantities of water utilized within the Santa Margarita watershed, and that, of course, would be reflected in the totals, which is the last column, and that would account for the discrepancy between these pumpage figures, as shown in Defendants' Exhibit D and Plaintiff's Exhibit 40.

Q. And that four thousand acre-feet to which you refer would be what is known as a loss by transpiration?

A. No, that would not include all of the transpiration loss in there. A part of the water goes to build a forage plant itself.

Q. There is no portion of that four thousand acre-feet that was actually withdrawn by artificial

(Testimony of Allen C. Bowen.)

means for use on the basin, to irrigate the grasses and weeds and other row crops?

A. No, it was drawn by the natural functions which are [828] inherent within the plant structure.

Q. Itself.

A. The root system picks the water up out of the underground basin and uses it to build the top of the forage portion of the plant.

Q. Now, were the answers which were prepared to the requests for written interrogatories of the Fallbrook Public Utility District prepared in your office and under your direction?

A. They were.

Q. Are you familiar with those answers, in a general way?

A. Well, a lot of answers have passed under the bridge. I would have to look at them and refresh my memory.

Q. Well, particularly——

A. As I recall, some of them were prepared and filed the 7th of January of this year.

Q. Particularly, I had in mind table No. 11, in which you were requested to give the amount of water used by each lessee who was leasing agricultural lands, and also table No. 12, and at that time I think you made the answer that the amount of water which was used by the respective lessees is not available.

A. That is as the answer appears on these tabulations.

Q. Have you acquired any information or rec-



(Testimony of Allen C. Bowen.)

ords which [829] would enable you at this time to give the amount of water which was used by the various tenants?

A. I believe those figures could be supplied by the ranch manager at this time. I have none of that data with me. Frankly, I wasn't prepared to be the defendants' first witness.

The Court: It shows you what clever lawyers can do. Besides, I warn you he is calling you under a tricky section, that, so far as it gives answers favorable to him, he may take them. So far as not favorable, he can put on a witness to contradict you. That is a specific provision of the federal law, but it is not new. We have had it in California for over 20 years. It is known as Section 2055 of the Code of Civil Procedure, and in federal practice it is known as Section 43 (b). You may call an adverse witness and ask him leading questions, and what you like you keep, and what you don't like, you put on a different witness to contradict.

The Witness: I am getting a liberal education as a lawyer, your Honor.

The Court: That is right.

Q. (By Mr. Dennis): Major, this morning when we were referring to Exhibit 22, I called your attention to certain irrigation or water-distribution systems which were located in Las Pulgas Canyon. That water-distribution system or irrigation system is not tied in to the system which derives the water from the Santa Margarita watershed, is it? [830]

A. No, it is not.

(Testimony of Allen C. Bowen.)

Q. And the same would be true as to the irrigation systems or water-distribution systems which are located in Horno, San Mateo, and San Onofre Canyons?

A. I don't recall any distribution system in Horno Canyon, but San Onofre and San Mateo do have water-distribution systems, which were not, no, sir.

Q. When I said "Horno," I was in the wrong watershed, as I was this morning.

Now, has the Naval Reservation, since it acquired title to the properties, ever irrigated any crops outside the watershed of the Santa Margarita River with water obtained from the watershed of the Santa Margarita River, with the exception of those portions of South Coast Mesa and Stuart Mesa which lie outside the watershed?

A. Well, they have irrigated some lawns.

Q. Outside of the watershed?

A. Outside of the watershed.

Q. That would be in Camp Del Mar?

A. Partly in Camp Del Mar, partly in the main area, up there on the hill.

Q. There has been no water used for irrigation within the limits of the Fallbrook Naval Ammunition Depot?

A. There, again, with the exception of lawns and flowers, your statement is substantially correct.

Q. In connection with the camp and quarters occupied by the plaintiff?

(Testimony of Allen C. Bowen.)

A. That is correct. To the best of my knowledge, that is correct.

Q. When I am referring to irrigation, I am referring to irrigation of pasture or row crops.

A. I am not aware of any commercial irrigation that has been engaged in up there.

Q. That would be true in any portion of the watershed from a line drawn approximately across the watershed in the lower reaches of the Ysidora basin?

The Court: Mr. Dennis, wouldn't the use of water for lawns or flowers incidental to residences be more a part of the domestic use than strictly irrigation use?

Mr. Dennis: That is my understanding, that such waters as you need to irrigate a small family orchard or lawns are a part of the domestic use.

The Court: Are a part of the domestic use. That is the accepted use. When you talk about irrigating is when you go into acreage and grow crops or develop pasture for other than the immediate domestic use of a person.

Mr. Dennis: Yes. Do you recall my question, Major?

The Court: I think he answered it.

The Witness: No, I didn't answer it. Will you read the question? [832]

(The question was read.)

The Witness: Your reference line, Mr. Dennis, is rather vague. Would you clarify that, please?

Q. (By Mr. Dennis): Well, if we should draw

(Testimony of Allen C. Bowen.)

a line across the Santa Margarita watershed at a point where there appears Camp Pendleton, between "Camp Joseph H. Pendleton Naval Reservation," directly across the watershed until about the head of where it would intersect the "C" in "Newton Canyon," are there any lands lying above, upstream from that line, which have been irrigated?

A. Let's pin it down to the intersection of the crest of the watershed, as shown on Defendants' Exhibit A, with the northerly boundary of Section 4, Township 11 South, Range 5 West, proceeding thence southeasterly to a point approximately in the center of Section 1, Township 11 South, Range 5 West, San Bernardino Base Line Meridian. And your question was, upstream from that point, had there been any substantial irrigation within the watershed, the Santa Margarita River watershed, lying within Camp Pendleton——

Q. That is correct.

A. ——U. S. Naval Hospital, and U. S. Naval Ammunition Depot, and the answer is there has been none to my knowledge, upstream from that point referred to.

Mr. Dennis: I think that is all.

The Court: All right. [833]

Mr. Shryock: Do you mean, Mr. Dennis, that we may now cross-examine your witness?

Mr. Dennis: As I said, I called this witness under Section 43 (b) of the Rules of Civil Procedure.



(Testimony of Allen C. Bowen.)

The Court: Read the rule, Commander. You don't have to. You can ask questions, but, you see his examination is cross examination. You may ask questions, but, unlike him, you are bound by what he says. [834]

### Cross Examination

Q. (By Mr. Shryock): If your Honor please, we propose to be most agreeable about this. We are delighted to have Major Bowen come here and add, from his inexhaustible fund of knowledge, to the information that we seek to provide to the court. But I would like Mr. Dennis to tell me where the Major fits under Rule 43 (b) under which he called him.

I am quite happy to have him call Major Bowen as his witness but I fail to see where Major Bowen qualifies under Rule 43 (b). And as I say we are most agreeable about it.

The Court: Well, I will tell you why. I will tell you how he qualifies.

Paragraph 2 says: "A party may call an adverse party or an officer, director or managing agent, or a public or private corporation or of a partnership or association which is an adverse party."

And I presume that one in charge of a certain department of work would fall into one of those categories, but I don't know which.

But I am going to say that I am satisfied, since becoming acquainted with the Major during the course of these proceedings he is going to tell the truth as he sees it no matter who calls him, so let us not be technical. [835]

(Testimony of Allen C. Bowen.)

Mr. Shryock: Very well, sir. We just didn't want to concede too readily.

The Court: This says the witness may be cross examined by the adverse party only upon the subject matter of his examination in chief. So, if you desire to do so, technically, under the State law, it is not called cross examination but this section calls it that. It has been in existence and it is a very good section if not abused. I am sure Mr. Dennis wouldn't abuse it.

Mr. Dennis: I thought it was an excellent section, your Honor.

The Court: Are you going to take some time with the witness?

Mr. Shryock: I think I might be some minutes at least.

The Court: Let us take a brief recess, not over 10 minutes.

(Short recess.) [836]

The Court: I am sorry, gentlemen. The lawyers have followed me from Las Vegas. They are here now.

Off the record.

(Statement off the record.)

The Court: All right. Let's go on.

Mr. Shryock: Your Honor please, I believe we can contrive to make this mercifully short.

The Court: I see. We will move faster tomorrow, gentlemen. There is always a tremendous lot of work when you are interrupted. As you see, the administrative work in a court of this size takes a good deal of time, and to try to do my full share

(Testimony of Allen C. Bowen.)

of trial work, as I have done, requires a lot of effort.

Mr. Shryock: Yes, sir.

The Court: So far I have succeeded. I don't know how long I can keep this up.

Mr. Shryock: Yes, sir.

Q. (By Mr. Shryock): Major, is it customary for the United States Marine Corps to billet soldiers in uncompleted structures or in structures in the process of construction?

A. It is not customary to billet troops in barracks that are under construction. Rather, they are placed in tents if the troops will appear before permanent facilities are available for billeting.

Q. Major, have you at any time ever asserted that San [837] Mateo, Las Pulgas, or San Onofre Creeks or Valleys or watersheds were within the watershed of the Santa Margarita River?

A. I have not. In fact, in response to Mr. Dennis' questions, I stated that they were outside of the watershed of the Santa Margarita River.

Q. Had they ever been so represented on any exhibit of the plaintiff in this case?

A. They have never been so represented.

Q. Now, I believe at one point, Major, Mr. Dennis asked you why Camp Margarita appeared on one of the sheets of Exhibit 22, and not on others. Could you explain how that occurs?

A. Yes, I can. The area occupied by Camp Margarita, which is currently under construction, appears only on one of the sheets placed in evidence

(Testimony of Allen C. Bowen.)

as Plaintiff's Exhibit No. 22, and, hence, the symbol showing the location of that camp could only be placed upon the one sheet where the location appears, whereas, in some of the other camp areas which Mr. Dennis asked me about, the great overlap between adjoining sheets showed the same area twice in some instances.

Q. Simply because they were within the overlap area?

A. That is right. In the overlap area we symbolized the construction, and so forth, clear out to the edge of the sheet, on each sheet of the four.

Q. Major, you have been shown a number of exhibits [838] which were, among other things, tables submitted in the answers to interrogatories. Are there any of those exhibits—and I am speaking now of B, C, and D, and tables 13, 22, and 7—which are not covered by plaintiff's exhibits, as set forth in the pretrial order?

A. I believe that most of that information is shown on Plaintiff's Exhibits Nos. 26, 27, 40 and 39. The method of preparation, of course, is a little different in each instance. That is as concerns the plaintiff's exhibits and the tables entered as Defendants' Exhibits C and B and D. [839]

Q. Of course 39 and 40 were not a part of the pretrial exhibits but were introduced after the case in chief was begun, is that not correct?

A. That is correct.

Q. Well, was there any difference in the char-



(Testimony of Allen C. Bowen.)

acter of preparation of the exhibits and the tables to which we have made reference?

A. Very much so. These tables that were prepared in answer to interrogatories of the defendant Santa Margarita Mutual Water Company and now entered as Defendants' Exhibits B, C and D, were prepared by the Office of Ground Water Resources under great duress.

The time given us was very small. About 10 days or two weeks as I recall and it didn't provide adequate time for exhaustively checking the records and checking back on the figures. So we might say that great duress was applied in the preparation of the Defendants' Exhibits B, C and D whereas the Plaintiff's Exhibits 26 and 27 were prepared with adequate time to check the information and examine all of the records thoroughly.

Q. Well, if you should find any discrepancy between those two classes of exhibits what can you state as to the degree of accuracy with which you would regard either class?

A. Well, since the time element was in our favor in the preparation of Plaintiff's Exhibits 26 and 27 and we were not [840] working under pressure in their preparation, I would say that the information depicted thereon is perhaps of a higher order than that prepared on Defendants' Exhibits B, C and D which were supplied, as I stated, in answer to interrogatories and upon very short notice.

Q. Now, Major, I believe that earlier Mr. Den-

(Testimony of Allen C. Bowen.)

nis asked you about certain land as shown on this Exhibit A, up in the DeLuz Creek watershed which he characterized as not having been within the original ranch grant, I believe. Do you recall that?

A. I do.

Q. And that was correct, there is such land, is there?

A. Yes, there is as shown by Plaintiff's Exhibit No. 43.

Q. And was such land included in your land utilization map, Exhibit 24?

A. Yes. All of those lands were classified and are represented in the land classification map, Plaintiff's Exhibit No. 23.

Q. And as to those lands—I beg your pardon, 23. And as to those lands, Major, the ones not in the original ranch grant, can you state within what soil conservation classification number those lands fell?

A. Those lands fell largely in the Class VIII. I would say that better than 95 per cent of those lands were included in class 8 and of the very small acreage which is considered [841] suitable for irrigation, portions of that were not transferred to Plaintiff's Exhibit No. 24 nor was water recommended for them because they were small and disassociated from other larger irrigable acreages.

Q. Even though they might properly have been classified as irrigable?

A. They were classified as irrigable on Plaintiff's Exhibit No. 23 and Plaintiff's Exhibit No.

(Testimony of Allen C. Bowen.)

25-A and -B. But as I stated, in the preparation of Plaintiff's Exhibit No. 24 some of those smaller areas were not carried forward under the land utilization program recommended for the camp area lying within the Santa Margarita River watershed.

Q. Major, did I understand you correctly to say that the so-called watersheds of DeLuz Creek and Fallbrook Creek are themselves entirely within the watershed of the Santa Margarita River and riparian to that river?

A. If the land that drains directly in both the Fallbrook and DeLuz Creek lie within the Santa Margarita river watershed, those two creeks, Fallbrook and DeLuz are tributary to the Santa Margarita River.

Q. Now, I believe in discussing irrigable pasturage at one point, on Mr. Dennis' Exhibit E, which was simply our Exhibit 24 colored, he asked you about certain lands near the Naval Ammunition Depot, I believe, and asked what the sole source of water for irrigating that irrigable pasturage would [842] be and if I recall correctly and please correct me if I do not, you stated that the basin, the Santa Margarita River basin would be the source of that water. Do you recall that?

A. That is correct.

Q. Did you take into consideration, Major, any water which might be coming down through the Temecula Canyon, the three second-feet provided by the stipulated judgment?

(Testimony of Allen C. Bowen.)

A. Why, certainly, if that water that was supplied in accordance with the stipulated judgment between the Vail and Rancho Santa Margarita River reaches the Camp Pendleton area it replenishes the underground supply of water in the Santa Margarita River basin.

Q. And in that sense then you took it into consideration?

A. Certainly.

Q. Even if the water were not used to recharge the basin, the three second-feet, it conceivably could constitute a source of surface water, could it not, and be a source of diversion for irrigable pasturage?

A. Very true. It could be operated by throwing up a small diversion structure and diverting it directly from the surface flow.

Q. Of course I am assuming someone doesn't step in and take away two and a half of the three second-feet before it gets to you.

A. If the water doesn't get to us obviously we can't use [843] it.

Q. Major, can you tell us the source of the water used for irrigating the golf course?

A. At present the water used for irrigating the golf course is sewage effluent discharged from sewage disposal plant No. 1, located in the 17 area of Camp Pendleton. [844]

Q. Now, one final question, Major: In preparing a land-utilization study, what is your primary objective in that study?



(Testimony of Allen C. Bowen.)

A. You mean, Commander, a land-classification study or a land-utilization study?

Q. A land-classification study and a land-utilization study.

A. The land-utilization study necessarily follows and is based thereon.

Q. The land-classification study comes first, does it not?      A. That is correct.

Q. In that classification study you determine what primary things?

A. The land-classification survey determines the inherent characteristics of the soil, including their site position.

Q. And in the land-utilization study, by way of contrast, you do what?

A. The land-utilization study shows, generally, the type of crops that would be adapted to those classes of land which have been determined as irrigable by the land-classification survey.

Q. And you say "would be adapted." Is that sufficient for the purpose of such a study, as to whether it would be? [845]

A. Well, they are adapted—of course, those crops are adapted to the areas indicated, provided sufficient water can be supplied to them.

Q. Well, let us assume for a moment that you determine a certain area is suitable for avocados. Does that necessarily mean that your study includes a planning of the actual planting of the avocados, of putting in an irrigation system, of determining the location of the pipes, of determining sources

(Testimony of Allen C. Bowen.)

of water and the costs of the installation of the system?

A. No. These types of surveys must necessarily precede any exhaustive engineering surveys to determine the construction of a water-distribution system. The engineering surveys are made always following land-classification and land-utilization surveys to determine, in the first place, if it is economically feasible to go ahead and spend money on further surveys and investigations to see if water can be brought to them.

Q. Now, have you, in representing to this court that there are some eighteen thousand-odd irrigable acres out of some thirty-seven thousand acres, sought to represent to this court that you have studied a plan whereby those eighteen thousand acres would be placed under actual cultivation?

A. No, I have not sought to represent that. As stated to Mr. Dennis, in response to his examination, the only [846] criterion upon the practicability and feasibility of developing these irrigation lands is by reference to lands similarly situated in this general vicinity, and there are lands similar to these that are being irrigated, in San Diego County particularly.

Q. And, finally, Major, is it true that you have included in a figure such as the eighteen thousand-odd irrigable acres only those which you consider to be economically feasible for irrigation?

A. I would consider these irrigable lands as

(Testimony of Allen C. Bowen.)

being susceptible of practical and economical irrigation.

Mr. Shryock: I believe that is all.

### Redirect Examination

Q. (By Mr. Dennis): Major, I believe that in January, 1952, certain answers were prepared in response to written interrogatories filed by the Fallbrook Public Utility District.

A. That is correct.

Q. And I believe those were prepared in the Office of Ground Water Resources and under your supervision.

A. That is correct.

Q. I believe that table No. 1, which consists of three sheets, and table No. 4, which consists of three sheets, were prepared in response to certain questions——

A. That is correct. [847]

Q. ——propounded by the Fallbrook Public Utility District. I believe that the answers, or the tables which you included in the answers to the Santa Margarita written interrogatories as tables 7 and 13, are copies of those tables.

A. Yes, to the best of my knowledge, they are. They are not exact copies. I would have to examine them in more detail. These sheets which were submitted in answer to Fallbrook Public Utility District's interrogatories are Ozalid prints, whereas the tables submitted in answer to Santa Margarita Mutual Water Company are carbon copies or typed sheets. The manner of arrangement is different. They are not exact copies one of the other.

(Testimony of Allen C. Bowen.)

Q. The information which was requested, though, and the information which was given, that is, the number of acre-feet that were used on various projects in Camp Joseph H. Pendleton are exactly the same, are they not?

A. Yes, the basic records.

Q. So that you had not only the time to prepare your answers to the Fallbrook interrogatories, but you had from January to June to which to check and see whether the information given was correct?

A. Well, as a matter of fact, when we prepared the answers to interrogatories posed by the Santa Margarita Mutual Water Company, as I recall, where we had submitted answers already to interrogatories posed by the Fallbrook Public Utility District, we simply copied that information, without further examination of the basic data.

Mr. Dennis: That is all.

Mr. Shryock: Thank you very much, Major.

(Witness excused.)

The Court: All right, gentlemen, tomorrow morning at 10:00 o'clock.

(Whereupon, at 4:50 o'clock p.m., Tuesday, November 18, 1952, an adjournment was taken until 10:00 o'clock a.m., Wednesday, November 19, 1952. [849])

Wednesday, November 19, 1952, 10:00 a.m.

The Court: Cause on trial.

Mr. Dennis: Were you through, Commander Shryock?



Mr. Shryock: Yes.

Mr. Dennis: I would like to call Mr. Hall for cross examination. At the time that I was cross examining Mr. Hall I thought that the plaintiff was going to put on certain evidence to tie in certain things in his testimony and as it didn't develop I would like at this time to ask him certain questions in regards to the maps which he prepared.

Mr. Shryock: Are you calling Mr. Hall under Rule 43(b).

The Court: No, no.

Mr. Dennis: No.

The Court: Just additional cross examination?

Mr. Dennis: Yes, just some more cross examination.

Mr. Shryock: Well, your Honor, it seems to me that he is calling Mr. Hall as his own witness at this time.

The Court: I don't know that it makes any difference.

Mr. Dennis: It wouldn't make too much difference. I think Mr. Hall will tell the truth anyhow.

The Court: All right.

Mr. Shryock: I am sure he will tell the truth but, of course, the Government has retained the services of Mr. Hall as an expert witness and we had finished our examination with [852] him.

I am sure I sympathize with the fact that I may not always conform to what Mr. Dennis expects me to do. He finished his cross examination of him and if you would like to apply for a recess for the purpose of discussing retaining Mr. Hall as your expert

witness I would be certainly not opposed to that.

The Court: Well, I think we are taking a lot of time worrying about things that may not be cause for worry.

I think if he desires to call him to ask him additional questions that he omitted asking I will allow him to do it at the present time.

Mr. Shryock: Yes, your Honor.

The Court: All right, let us go ahead.

H. M. HALL

having been previously sworn, resumed the stand and testified as follows:

Cross Examination—(Continued)

Q. (By Mr. Dennis): If the court please, with the permission of counsel for the plaintiff, since Mr. Hall last testified, he has taken a red and green pencil and on Plaintiff's Exhibit 32 outlined certain areas which represent the various grants which comprise the Vail holdings and I would like to ask Mr. Hall at this time if the area which he has outlined in red represents the original extent of the Pauba grant?     A. That is correct.

Q. And the area which is outlined in green delineates the original area of the little Temecula grant?     A. That is correct.

Q. And the area which you have outlined in blue represents the original Temecula grant?

A. Only the southern part.

Q. That is the portion which is now owned by Mr. Vail?     A. Yes.

(Testimony of H. M. Hall.)

Q. And when I say "Mr. Vail" I am referring to the Vail interests? A. Vail Company.

Q. And then southerly and easterly from that area you have outlined another area in red and that outlines the original boundaries of the Santa Rosa Ranch?

A. If you change easterly to westerly.

Q. Westerly?

A. That is correct. [854]

Q. Now, Mr. Hall, I want to call your attention to a map which shows that it was prepared by A. L. Sonderigger, and ask you if that was the map which was prepared under your supervision and bears your certificate in the upper left-hand corner, and is a copy of the map which was filed with the Division of Water Resources of the State of California as a part of the Vail application to appropriate waters of the Santa Margarita River.

A. That is correct, yes.

Mr. Dennis: I would like to offer this map in evidence as Defendants' Exhibit—is it E?

Mr. Shryock: F.

Mr. Dennis: —F.

The Witness: Isn't this only a part? Aren't there two parts to this?

Mr. Dennis: I believe there is another part which shows the location of the dam site.

The Witness: Yes, and the easterly end of the Pauba Valley.

Mr. Dennis: If there is, the Division of Water Resources did not furnish it.

(Testimony of H. M. Hall.)

The Witness: This shows only a part of the land to be irrigated.

Q. (By Mr. Dennis): Now, Mr. Hall, as I remember your testimony on direct examination, you stated that the Vails [855] were irrigating approximately 4500 acres of land at the present time.

The Clerk: Mr. Dennis, the court never admitted this.

Mr. Dennis: Oh.

The Clerk: Is this exhibit admitted, your Honor?

The Court: It may be received.

The Clerk: That is F in evidence.

(The map referred to, marked Defendants' Exhibit F, was received in evidence.)

The Witness: There is a little less than 4500 acres under the present irrigation system.

Q. (By Mr. Dennis): Is there any of that acreage that is being irrigated at the present time that does not overlies what is known as the Temecula alluvial basin?

A. The delineation of the Temecula alluvial basin is one thing, speaking from a surface indication, and another thing speaking geologically. If we speak of it geologically, then there is no part being irrigated except what overlies the basin, but there is some being irrigated that is beyond the ordinary surface indication.

Q. Approximately how many acres?

A. In the neighborhood of four or five hundred.



(Testimony of H. M. Hall.)

Q. Approximately how long has that land been irrigated, that you know of?

A. To my knowledge, it has been irrigated since 1918, [856] when I first was on the ranch, but it was under irrigation at that time.

Q. Now, are you familiar with the location of the San Diego aqueduct, so-called, or feeder line?

A. Yes.

Q. And that crosses the Temecula-Santa Margarita River in the vicinity of the junction of Penjango and Murrieta Creek with the Temecula?

A. Considerably above that. It is above the old highway bridge.

Q. Approximately how far above the confluence with the Murrieta?

A. Three-quarters of a mile.

Q. And have the Vails irrigated any property below the Railroad Canyon gauging station?

A. No.

Q. There is a very small proportion of their holdings that lies below the Railroad Canyon gauging station?

A. It is about a half-mile from the gauging station to the ranch line.

Q. Approximately how many acres do they have that lie below the Railroad Canyon gauging station?

A. That is a lineal dimension you are giving me. It would depend upon the width you consider. But did you mean irrigable acres? [857]

Q. Irrigable acres, yes.

(Testimony of H. M. Hall.)

A. I don't think there is any in the grant, that is, that is riparian to the Temecula stream.

Mr. Dennis: I think that is all.

The Court: All right.

Mr. Shryock: Mr. Dennis, I merely want to get the record straight. I am a little confused myself. Did you ask Mr. Hall whether all of the Vail lands being irrigated overlie the Temecula alluvial basin?

Mr. Dennis: That is correct.

Mr. Shryock: All of them? All of the 4500 acres, almost, that he testified to?

Mr. Dennis: That is correct. [858]

Mr. Shryock: Did you not then ask Mr. Hall what is that acreage when he said "yes, they do overlie all of what is known geologically the basin." Did you not say then "How many acres is that?"

Mr. Dennis: I don't believe so.

Mr. Shryock: And I thought Mr. Hall answered four or five hundred.

Mr. Dennis: No. I think that was four or five hundred acres which did not overlie.

Mr. Shryock: Could you straighten us out on that, Mr. Hall?

The Witness: That was my understanding. He asked if any of the land did not overlie the basin.

Mr. Shryock: Did not overlie?

The Witness: Yes. And I said there was four or five hundred which did not.

Mr. Shryock: Did not overlie. Thank you very much, Mr. Hall. No further questions.

The Court: All right, Mr. Hall.

Mr. Dennis: I want to call Col. Robertson under Rule 43(b) of the Rules of Civil Procedure.

The Court: All right.

Mr. Shryock: Now, if you Honor please——

The Court: Let us not argue about it. I knew this was coming because you didn't hear a statement Mr. Dennis made in [859] one of the many informal conferences we had. He said he probably wouldn't have his own experts because he thinks the facts will be established by your experts and that all he will do is elicit certain facts and then argue the law.

Didn't you hear him make that statement?

Mr. Shryock: I recall reading it, yes, sir.

The Court: I heard him make the statement.

Mr. Shryock: May I have your Honor's permission to state for the record that we propose to continue to be agreeable about this and are delighted to have the Colonel return, but we would prefer not to concede that he qualifies under Rule 43(b) and that we consider he is Mr. Dennis' witness.

The Court: All right. We are dealing with the Government of the United States and I don't know who is and who is not an agent. I presume theoretically General Smith would be the only one and you would object very much if they brought him in here and asked questions about something he knows nothing about. So long as these are subordinates or civilian employees we will let them testify.

#### ELIOTT B. ROBERTSON

having been previously sworn, resumed the stand and testified further as follows:

(Testimony of Elliott B. Robertson.)

Cross Examination—(Continued)

Q. (By Mr. Dennis): For the purpose of the record I believe Col. Robertson [860] testified, I think it is on page 631 and 632 of the transcript, that from 1946, February of 1946 to February of 1951 that he remained in the same specific job as assistant head of the Utility Public Works Section of the Marine Corps and that on February of 1951 he stated he relieved his superior and became the head of the Utility and Public Works Section which job he now occupies. And that he also assumed the additional and collateral duty which accompanied the assignment which is entitled "Recorder of the Marine Corps Station Development Board" and that he has personally been directed and charged by the Assistant Commandant of the Marine Corps to the responsibility and duty of looking at each and every station and project and recommending to the board the approval or disapproval, modification and relative merit with regard to other projects which may be submitted by other stations and I would like that, in view of his duties—in view of those duties I feel he is qualified under that section.

The Court: All right.

Mr. Dennis: I just wanted to make that statement, your Honor, for the record.

Q. (By Mr. Dennis): Now, Colonel, are you familiar with the location where the Fallbrook Public Utility District has been making diversions?

A. I have visited it.

Q. And are you familiar with its location in



(Testimony of Elliott B. Robertson.)

regard to [861] Railroad Canyon gauging station and the Fallbrook gauging station?

A. I know it is downstream. I have never measured the distance.

Q. I mean it is downstream from the Fallbrook gauging station and downstream from the Railroad Canyon gauging station?

A. (No answer.)

Mr. Shryock: Excuse me, Mr. Dennis. Just so the witness isn't confused, are you asking him whether the Fallbrook gauging station is downstream from the point of diversion of Fallbrook?

Mr. Dennis: No. I am asking whether or not Fallbrook's point of diversion on the Santa Margarita River is downstream from the Fallbrook gauging station.

Mr. Shryock: In other words from both of the gauging stations you mean?

Mr. Dennis: Yes.

Mr. Shryock: And not between them?

Mr. Dennis: That is right.

Mr. Shryock: Did you understand that question?

The Witness: I focused my mind on the Railroad Canyon gauging station as downstream from that. I don't know its relative position to the other one.

Q. (By Mr. Dennis): You don't know whether it is upstream [862] or downstream?

A. It is not on our land and I never visited it.

Mr. Dennis: I am not sure either as to its loca-

(Testimony of Elliott B. Robertson.)

tion and I think that is one of the things we should get into the record.

Q. (By Mr. Dennis): Now, you are familiar with the water problems of the United States Naval Ammunition Depot and Camp Joseph H. Pendleton and the United States Naval Hospital, are you not?

A. To some degree.

Q. And I believe that the United States Naval Hospital has on occasion been unable to obtain a sufficient supply of water from the pumping station which they maintain on the United States Naval Ammunition Depot, from the Santa Margarita River, is that right?

Mr. Shryock: May we have that question read, please?

(Question read.)

The Witness: I am not aware that the hospital maintains a pumping station on Fallbrook.

Q. (By Mr. Dennis): Pardon me?

A. I am not aware that the hospital maintains a pumping station on the Naval Ammunition Depot.

Q. Do they maintain their own pumping station?

A. The pumps are outside the ammunition depot so far as I know.

Q. But they do maintain their own pumps? [863]

A. That is correct.

Q. Has there been any time when they did not secure sufficient quantity from the Santa Margarita River to meet their needs?

Mr. Shryock: If you know, Colonel.

(Testimony of Elliott B. Robertson.)

The Witness: The answer is no but there was a time when we had to take action to get it from another well.

Q. (By Mr. Dennis): Over how long a period?

A. They never actually ran out. We took preventive action.

Q. And has there been any time when there was not sufficient water obtained from the Santa Margarita River to meet the military demand of the United States of America at Camp Joseph H. Pendleton?

A. There have been numerous times and periods when we could not get water that we normally would use for military requirements, but by strict conservation and sacrifice we were able to get by.

Q. How many periods have you experienced such a thing since you acquired the property in 1942?

A. I couldn't testify to that, to the total.

Q. Now, has there been any time when the United States Naval Ammunition Depot could not secure sufficient water to meet their requirements for military purposes?

A. There are two times to my knowledge. There may have [864] been more.

Q. And when did those occur?

A. In the summer of 1951 and summer of 1952.

Q. But at all other times they have had sufficient water?

A. I don't know whether they have or have not.

Q. At least, it has not been called to your atten-

(Testimony of Elliott B. Robertson.)

tion that they were short of water on any other occasions than those to which you just testified?

A. I have never sought to find out.

Q. Now, there are users of water located between the Vail properties and Camp Joseph H. Pendleton, are there not, on the Santa Margarita River?

A. I would suppose so.

Q. Well, you have inspected the watershed, and you have seen the pumps and diversion dams on the river?

A. I have not inspected all of them. I have flown over them. The only point I visited was the Fallbrook diversion.

Q. Now, I believe that at the time that the court and counsel made an inspection of the plaintiff's properties and the Vail properties in 1952 you were present, were you not?

A. That is correct.

Q. At that time was there any water flowing in the Santa Margarita River below the De Luz dam site?

A. No.

Q. At that time was there any water flowing under [866] Highway 101 on the Vail properties?

A. 101 is not on the Vail properties, if that is the question.

Q. Pardon me. Highway 395.

A. There was.

Q. Do you remember the estimate of the quantity of water that was flowing at that point, that was given by Mr. Hall on that trip?

A. I did not hear it.



(Testimony of Elliott B. Robertson.)

Q. Do you recall that when we were passing the Vail dam we crossed a small tributary of the Santa Margarita-Temecula River, that was at that time discharging water into the Vail Lake?

A. I don't specifically remember.

Q. Do you recall whether any water was being released from the Vail Dam at that time?

A. None.

Q. Now, I believe that the location of the diversion dam maintained by the United States Naval Ammunition Depot for the collection gallery, as we have called it, was downstream from the Fallbrook gauging station——

A. I believe——

Q. ——but upstream from the northerly or easterly limits of the Camp Pendleton basin; is that correct?

A. As I said before, I am not sure where the Fallbrook [867] station is. I believe it is above, and the diversion of the Ammunition Depot is above the basin which we have described as beginning at De Luz and going down.

Q. Now, Colonel, calling your attention to Plaintiff's Exhibit 22, and, in particular, to the sheet which is entitled "Las Pulgas Canyon," there is a hatched area there located in Las Pulgas Canyon, and opposite the hatched area we find the figures, 3000 men in 1952, and 3500 men in 1953.

Does that represent the number of men it is proposed to billet there?

A. That indicates the new billets either under

(Testimony of Elliott B. Robertson.)

construction or intended to be constructed at that point. That does not indicate the total number of men that will be there.

Q. But they will accommodate that number of men?

A. That is the designed capacity. I might say the "3,000 men in billets" are now under construction. The "3500 men" shown there are a part of that which I previously described as having been withheld by the Congress because of the water situation.

Q. And your testimony would be the same as to each one of the hatched areas that appear on the other sheets in Plaintiff's Exhibit 22?

A. Yes; that is, of those four camps. There are other hatched areas.

Q. Yes, that is true. When you say that a man would [868] be billeted in that area, you mean that he would eat, would sleep, and would bathe in that particular area?

A. That is his place when he is not in the field training.

Q. And the requirements for water for the individuals that would be billeted there would be practically exclusively satisfied from that particular water-distribution system that furnish that area?

A. That is correct.

Q. Now, I noticed a great number of the plaintiff's exhibits are labeled "Confidential." That was for reasons of military security, was it not?

A. I don't think I could give a general answer

(Testimony of Elliott B. Robertson.)

to that without looking at the exhibits. In general, they were classified confidential to keep that information unto ourselves until we were ready to release it, had it correlated, and so on.

Q. Well, it was the policy of the plaintiff, was it not, to keep the location of its installations and the location of its irrigation works and water-distributing systems more or less from the public for purposes of military security?

A. That was true during the war. However, the map which is on the board there, under the one exposed, I think that it is your exhibit now——

Q. A.

A. ——is a map which shows most of our installations, and is available for public sale, for public purchase. We have made no effort to conceal irrigation systems, and they are visible from the highway.

Mr. Dennis: I didn't get the last answer. I wonder if you would read it, please.

(The answer was read.)

The Witness (continuing): Nor have we concealed sewage plants, or anything of that kind. They are visible for all to see who pass that way.

Q. (By Mr. Dennis): Colonel, when you say these maps were for purchase, you are talking about the topo map? A. The basic map.

Q. Without the information which has been superimposed on the topo map?

A. That is correct.

Q. And, as I remember your testimony, the naval reservation, at least the southerly and easterly

(Testimony of Elliott B. Robertson.)

boundaries and the boundaries along the Highway 101, has been fenced?

A. My testimony was that the southerly and easterly boundaries were fenced at the points I have witnessed, and that the highway had not been fenced by the Government, but there appeared to be highway fences when we came there.

Q. But you do maintain signs, "Military Reservation" [870] and "No Trespassing," and so forth?

A. That is correct.

Q. And you have maintained patrols and denied access to the reservation to people generally, unless they had business on the reservation, at which time they had to secure permits to go and tell their place of business, and what they were going to do there?

A. It is reasonably easy to get on Camp Pendleton. The primary reason for those signs is to keep people from getting into the shooting areas and getting hurt. There is practically no limitation on access to visiting the living areas.

Q. When you say the installations and the irrigation systems and water-distribution systems are visible from the highways, you are referring to the highways within the boundaries of Camp Pendleton and maintained by Camp Pendleton, with the exception of such structures as might be visible from 101?

A. That is correct.

Q. Now, does Camp Pendleton maintain what is called a weekly muster roll?

A. I don't believe so. I think the muster roll went out of existence some time ago.



(Testimony of Elliott B. Robertson.)

Q. Well, what takes its place?

A. It used to be a daily muster roll. [871]

Q. What takes the place of what was known as a daily muster roll?

A. I am not informed on personnel administration. I could not answer.

Q. Well, Colonel, it is the policy, is it not, of the Marine Corps to keep accurate and permanent records as to where each man is billeted at all times, so that——

A. I have known of no effort to keep permanent records of where a man was billeted.

Q. At Camp Pendleton?

A. Or any place else.

Q. So that you have no records in Washington or at Camp Pendleton which would show where a particular man was billeted at any particular time?

A. I think we should come to an understanding as to what is meant by "billeted." I think that is the place where he sleeps, the building that he sleeps in.

Q. That is correct.

A. The records in Washington show by name where an individual is stationed, whether he is at Camp Pendleton or in Korea, or some other place. At Camp Pendleton the records are kept essentially, I believe, as to where or what unit he is attached to. His unit keeps track of where he is, of the squad room he is in, but it is not a permanent record in that respect, and when he goes, we forget him. [872]

Q. And are those records then destroyed?

(Testimony of Elliott B. Robertson.)

A. I assume so. I am not informed.

Mr. Dennis: I think that is all.

The Court: All right.

Mr. Shryock: Thank you very much, Colonel.

(Witness excused.) [873]

Mr. Shryock: I would like to say this, that Mr. Dennis asked Colonel Robertson if he knew where the Fallbrook gauging station was.

The Fallbrook gauging station is one of the six gauging stations which have figured prominently in this litigation. Mr. Dennis then stated that even he did not know or was not sure where it was, even though he proposes to divert water for his company almost exactly at the point of diversion of the Fallbrook diversion—Fallbrook Public Utility District.

Now I quite agree with Mr. Dennis that the location of the gauging station should be in the record but I feel that it should be in accurately.

Now if you wish us to produce a witness who can tell you where the gauging station is or if you will accept our statement that it is some yards below the point of the Fallbrook diversion, why, we can satisfy you on either count.

Mr. Dennis: I think that the location, Commander, of the Fallbrook gauging station has been definitely established. However, we have not established the method of diversion of Fallbrook or the location of their diversion point.

The only thing I want to get in the record is, is

Fallbrook at the present time diverting water above or below the Fallbrook gauging station.

Mr. Shryock: Are you able to answer that?

Mr. Dennis: I am not. I do not know whether they are [874] or are not at the present time because I do not know where the diversion is. I have seen the station but I have—or the diversion works, but I have not paid any attention and did not at the time I went there, to locate the works physically in relationship to the gauging station.

Mr. Shryock: I thought it was your contention that it would be advisable from the standpoint of the record to have that question answered.

Mr. Dennis: I think we should.

Mr. Shryock: Well, as I say, I can tell you that the Fallbrook gauging station is below the point of diversion.

Mr. Dennis: I am willing to accept your statement.

Mr. Shryock: Very well.

Mr. Dennis: I believe by the terms of the pre-trial order that the Santa Margarita Mutual Water Company was going to introduce in evidence a copy of its articles of incorporation and I believe that a copy has heretofore been delivered to Commander Shryock and I would like to introduce this in evidence as the defendants' next in order.

Mr. Shryock: No objection.

The Clerk: Is it admitted, your Honor?

The Court: Yes.

The Clerk: Defendants' Exhibit G in evidence.

(The document referred to was marked Defendants' Exhibit G and received in evidence.)

Mr. Dennis: I have here a copy of the by-laws of the Santa Margarita Mutual Water Company, a copy of which has been handed to the Commander and I would like to introduce this in evidence as Defendants' Exhibit H.

The Court: Received.

(The document referred to was marked Defendants' Exhibit H and received in evidence.)

Mr. Shryock: No objection.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

Mr. Dennis: I have a certificate here from Frank M. Jordan, Secretary of State of the State of California, certifying that the Santa Margarita Mutual Water Company is a corporation and is incorporated under the laws of the State of California and that it is authorized to do business in the State of California. A copy of this has heretofore been handed to counsel for the plaintiff.

The Court: All right.

Mr. Dennis: Which I will introduce as Defendants' I.

The Clerk: In evidence, your Honor?

The Court: Yes.

(The document referred to was marked Defendants' Exhibit I and received in evidence.)

Mr. Dennis: I have letters, a copy—strike that. I have a copy of a protest which was filed by the United States of [876] America, the United States Navy, represented by the Commandant of the Elev-



enth Naval District to the application of the Santa Margarita Mutual Water Company, a copy of which has been heretofore handed to counsel for plaintiff and which I introduce in evidence as Defendants' Exhibit J.

The Court: Received.

Mr. Shryock: No objection.

(The document referred to was marked Defendants' Exhibit J and received in evidence.)

Mr. Dennis: I think in accordance with your Honor's suggestion that if there are any particular portions of an exhibit which counsel desires to call attention to they should do so at the time it is introduced.

This particular protest states that, and shows the number of acre-feet of water which have been used by Camp Pendleton, both for military and for agricultural purposes. For the year 1942 and 1943 and the years 1945 and 1946 it gives those figures.

It also shows the mean annual use of water for that period.

Mr. Shryock: Is there a date on that protest?

Mr. Dennis: I do not believe that the protest had a date. We do have the letter.

The Court: What is the filing date?

Mr. Dennis: There is no filing date on it. We have here the records of the Division of Water Resources and they have a letter which shows that that application or protest was [877] forwarded on—I will get that date in just a moment.

Mr. Shryock: It indicates it was received in

the Division of Water Resources on February 26, 1947, does it not?

Mr. Dennis: I think that is correct.

The Court: All right, that date is sufficient.

Mr. Dennis: And the last paragraph of that protest reads as follows:

“Until flash flood waters are controlled under a regulated water conservation and flood control program, such as is under the study by the Bureau of Reclamation, the Government must contest applications to appropriate water since appropriation will imperil the mission of Camp Pendleton as a military base and result in a permanent devaluation of Government land either for military or agricultural use.”

I also have a copy of the Navy's application to appropriate waters of the Santa Margarita River which was filed with the Division of Water Resources, the State engineer of the State of California, which was prepared by the Attorney General's office in co-operation with the Division of Water Resources, and copies of letters, one written by G. B. Erskine on the 13th of July, 1949, one written by O. T. Pfeiffer on the 3rd of November 1948 and the third letter written by G. B. Erskine on the 13th of September 1948 which amended the application filed by the Navy with the Division of Water Resources. [878]

I wish to offer the three letters and the application in evidence as the Defendants' next in order.

Mr. Shryock: Well, we don't object to them. We previously called attention to the fact that we

don't consider that this application has any relevance to these proceedings but we have no objection to their being offered.

The Court: Received.

The Clerk: Defendants' Exhibit K in evidence.

(The document referred to was marked Defendants' Exhibit K and received in evidence.)

Mr. Dennis: I also want to offer in evidence at this time two maps, one indicating or entitled: "Topographic Map of a Portion of Camp Joseph H. Pendleton and Fallbrook Naval Ammunition Depot, Eleventh Naval District, San Diego, indicating areas to be inundated by the proposed Deluz dam on the Santa Margarita River."

And the other map is entitled: "A Map of Camp Joseph H. Pendleton, Fallbrook Naval Ammunition Depot and Naval Hospital, Santa Margarita Ranch, Oceanside, California, Eleventh Naval District, San Diego, California, water distribution system and proposed extensions," which maps were attached to the application of the Navy which is offered in evidence.

Mr. Shryock: And subject to the same comments which applied to the previous exhibits. We have no objection to them. [879]

The Court: All right.

The Clerk: Defendants' Exhibit L in evidence.

(The document referred to was marked Defendants' Exhibit L and received in evidence.)

Mr. Dennis: Would you mark them L-1 and L-2?

The Clerk: All right, L-1 and L-2.

(The documents referred to were marked De-

endants' Exhibits L-1 and L-2 and received in evidence.)

Mr. Dennis: At this time I wish to offer in evidence a copy of a protest filed by the United States Navy, represented by the Commandant of the Eleventh Naval District, to the application No. 11586 of the Fallbrook Public Utility District, which application gives pertinent data as to the amount of water which has been used for military and agricultural use for the period 1942 to 1943 and 1945 to 1946.

The Court: All right.

Mr. Shryock: No objection.

The Clerk: Defendants' Exhibit M in evidence.

(The document referred to was marked Defendants' Exhibit M and received in evidence.)

Mr. Dennis: And at this time I wish to offer a copy of the protest filed by the United States Navy, represented by the Commandant of the Eleventh Naval District, to the application 11518 of the Vail Company, together with a letter which accompanied—with which the application was forwarded. [880]

Mr. Shryock: No objection.

The Court: Received.

(The document referred to was marked Defendants' Exhibit N and received in evidence.)

Mr. Dennis: At this time I would like to call Mr. Caldwell.

The Court: I think we had better take a short recess before you call a witness.

(Short recess.) [881]



Mr. Dennis: Your Honor please, I notice I neglected to put in one exhibit.

The Court: All right.

Mr. Dennis: I have here the Fallbrook pretrial exhibit I, it is marked, which shows the amount of water which has been diverted by the Fallbrook Public Utility District from 1925 to 1952, which I would want to present in evidence as the defendants' next in order.

The Court: All right.

The Clerk: That is Defendants' Exhibit O in evidence.

(The document referred to, marked Defendants' Exhibit O, was received in evidence.)

The Court: All right.

Mr. Dennis: Mr. Caldwell.

Mr. Shryock: May I understand, then, that is the Santa Margarita Mutual Water Company's Exhibit I?

Mr. Dennis: No, that was Fallbrook's pretrial Exhibit I, and it will now be Santa Margarita Mutual Water Company's Exhibit O.

Mr. Shryock: You are adopting it as your exhibit?

Mr. Dennis: Yes.

#### DAVE LYNAM CALDWELL

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows: [882]

#### Direct Examination

The Clerk: What is your name, please?

(Testimony of Dave Lynam Caldwell.)

The Witness: Dave Lynam Caldwell.

Q. (By Mr. Dennis): Mr. Caldwell, what is your address?

A. It is Route 1, Box 148, Fallbrook.

Q. Do you have a business address?

A. That is the same address.

Q. You are president of the Santa Margarita Mutual Water Company? A. That is right.

Q. What is your business or profession?

A. At the present time I am a farmer. Previously, I have been occupied as a petroleum engineer.

Q. You had the ordinary grade school and high school education? A. Yes, sir.

Q. Following that did you attend any college or university?

A. Yes, I attended Stanford University, and received a degree in geology in 1922.

Q. And you are a registered petroleum engineer? A. That is right.

Q. From the time you graduated until approximately two years ago, you pursued your profession?

A. As a petroleum engineer, yes.

Q. In the course of your work, did you have occasion from time to time to prepare graphs?

A. Yes.

Q. At my request, have you prepared certain graphs which you have in your possession at this time? A. That is correct.

Q. Will you tell us, briefly, what documents you used in the preparation of those graphs?

(Testimony of Dave Lynam Caldwell.)

A. Yes. Exhibit No. 14 has the records of the U.S.G.S. gauges at the several gauging stations, and several exhibits that have been presented. Exhibit No. 26——

The Court: Just one minute. All right.

The Witness: Exhibit 26 shows the amount of water pumped at the Pendleton pumps.

Exhibit No. 27 shows the amount of water pumped at the Ysidora pumps.

Exhibit 28 shows the amount of water pumped by Vail Ranch.

Exhibit 7 shows the amount of water in storage at Lake Vail. [884]

Mr. Shryock: Now, the witness is referring to Plaintiff's Exhibits, is that correct?

Mr. Dennis: Plaintiff's exhibits, yes.

Q. (By Mr. Dennis): It is my understanding, Mr. Caldwell, that the graphs which you prepared were prepared from Plaintiff's Exhibits 26, 27, 28 and from the several schedules or tables which have been prepared by the plaintiff in answer to the written interrogatories of the Santa Margarita Mutual Water Company and which was subsequently introduced in evidence, is that correct?

A. Yes. I believe that one of those is called "Table 7, Sheet 1" and shows the amount of water used at Camp Pendleton.

Q. And I believe that you also obtained certain information, did you not, from the transcript of the proceedings and in particular certain testimony that was given by Colonel Robertson in respect to

(Testimony of Dave Lynam Caldwell.)

the number of men who were stationed and whom they anticipated would be stationed at Camp Joseph H. Pendleton?      A. That is correct.

Mr. Dennis: I would like to offer at this time a graph entitled "Camp Pendleton Water Usage" as Defendants' Exhibit P, I believe it is, is it not?

Mr. Shryock: Let me see that, please.

(Document handed to Mr. Shryock.) [885]

The Clerk: Is this admitted, your Honor?

The Court: It will be received.

The Clerk: Defendants' P in evidence.

(The document referred to was marked Defendants' Exhibit P and received in evidence.)

Mr. Dennis: I would like to offer in evidence a graph entitled—which bears the legend: "Total Natural Flow of Santa Margarita River at Ysidora gauging station" as Defendants' Exhibit Q in evidence.

The Court: It will be received.

(The document referred to was marked Defendants' Exhibit Q and received in evidence.)

Mr. Shryock: Mr. Dennis, as you offer these will you be kind enough to have the witness identify them with the Plaintiff's Exhibit from which they were taken?

Mr. Dennis: Yes. I thought I would go into that as soon as they are in evidence. Do you want me to do it first?

Mr. Shryock: If you could mention that in passing. For example, Exhibit P, "Camp Pendleton Water Usage."



(Testimony of Dave Lynam Caldwell.)

Q. (By Mr. Dennis): Exhibit P, Mr. Caldwell, will you tell me how you acquired the information which is shown on that graph?

A. The information shown on that graph was obtained from Table 7 Sheet 1 which I understand is the answer to the interrogatory and also information obtained from Colonel Robertson's testimony. [886]

Mr. Shryock: We might add that that was Defendants' Exhibit D table 7.

Mr. Dennis: Yes.

Q. (By Mr. Dennis): Now, calling your attention to Defendants' Exhibit Q would you tell us where you obtained the information which you used in plotting that graph?

A. That information was obtained from Plaintiff's Exhibits 26 and 27 and from Exhibit No. 14.

Q. And also from Plaintiff's Exhibit 28?

A. Yes, Plaintiff's Exhibit 28 and Exhibit No. 7.

Q. Plaintiff's Exhibit No. 7? A. Yes.

The Clerk: Is Defendants' Exhibit Q admitted, your Honor?

The Court: It will be received.

Q. (By Mr. Dennis): Now calling your attention, Mr. Caldwell, to the next graph which at the top says: "Total natural flow of the Santa Margarita river." Will you tell us where you obtained the information which you used in plotting that graph?

A. That information was obtained from Exhibit 14 and from Exhibit No. 28 and Exhibit No. 7.

Mr. Dennis: I would like to offer this in evidence as [887] Defendants' next in order.

(Testimony of Dave Lynam Caldwell.)

The Court: Received.

The Clerk: Defendants' Exhibit R in evidence.

(The document referred to was marked Defendant's Exhibit R and received in evidence.)

Q. (By Mr. Dennis): Now, Mr. Caldwell, calling your attention to the graph which is entitled "Vail water data," will you tell us where you obtained the information which you used in plotting that graph?

A. The information was obtained from Plaintiff's Exhibit No. 14 and Plaintiff's Exhibit No. 28 and also from testimony by Mr. Hall. [888]

Mr. Dennis: I would like to offer this graph next in evidence as defendants' next in order.

The Court: It may be received.

The Clerk: That is Defendants' Exhibit S.

(The document referred to, marked Defendants' Exhibit S, was received in evidence.)

Q. (By Mr. Dennis): Now, Mr. Caldwell, calling your attention to the graph which is entitled "Camp Pendleton Water Data," will you tell us where you obtained the information which you used in plotting that graph?

A. It was obtained from Exhibits Nos. 14, 26, 27, 28 and 7; also Exhibit No. 38, I believe. I will have to check on that. Yes, Exhibit No. 38.

Mr. Dennis: I would like to offer this graph as defendants' exhibit next in order.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Defendants' Exhibit T in evidence.

(Testimony of Dave Lynam Caldwell.)

(The document referred to, marked Defendants' Exhibit T, was received in evidence.)

Q. (By Mr. Dennis): Now, Mr. Caldwell, calling your attention to the first graph, which was introduced in evidence as Defendants' Exhibit P, will you tell us what that graph represents?

A. That shows the amount of water used at Camp [889] Pendleton in the years 1943 through 1951. That is plotted in green crayon. Also, the number of individuals at the camp, as testified to by Colonel Robertson, which is colored in orange-yellow. And the lower graph, colored in blue, shows the number of individuals per acre-foot of water used.

Q. The figures on the left-hand side represent the number of individuals stationed at Camp Pendleton?

A. Yes.

Q. And the figures on the right-hand side show the amount of water used by Camp Pendleton in terms of acre-feet per year?

A. That is right.

Q. And the small scale in the lower right-hand corner is placed there to show the number of acre-feet required to service a certain designated number of individuals?

A. That is correct, except that it is plotted in individuals per acre-foot.

Q. Now, Mr. Caldwell, calling your attention to Defendants' Exhibit Q, do you have that in front of you?

A. Yes.

(Testimony of Dave Lynam Caldwell.)

Q. Will you tell us what the figures and lines which are shown on that graph represent?

A. The lower graph shows the amount of water used at Camp Pendleton during the water years 1942-43 up to the latest information we have for this year. That is colored [890] in purple. And the other graph shown is the total natural flow of the Santa Margarita River at the Ysidora gauging station, including Camp Pendleton and the Ysidora pumps, as shown by Exhibits 26 and 27, and the water pumped by Vail Ranch, Exhibit 28, and the water stored by Lake Vail, which is Exhibit 7.

Q. In other words, the line which is colored in green, and which has an arrow indicating it is the total natural flow of the Santa Margarita River, was obtained by adding to the records maintained by the gauging station for each month the amount of water which the plaintiff claims to have used from the Santa Margarita River, as shown by Exhibits 26 and 27, plus such water as the Vails may have extracted, as shown by Exhibit 28, plus such water as may have been stored by the Vails, as shown by Exhibit 7?

A. That is correct.

Q. And, as I understand, the purple line represents the amount of water which was pumped or diverted from the Santa Margarita River by means of pumps, as shown by their Exhibits 26 and 27?

A. That is right.

Q. And the figures on the left-hand side indicate the number of acre-feet?

Q. That is right.



(Testimony of Dave Lynam Caldwell.)

Q. And the letters which appear above the water years [891] represented by the figures "1947-48" stand, reading from left to right, for October, November, December, January, February, March, April, May, June, July, August, and September; is that correct? A. That is correct.

Q. Now, Mr. Caldwell, calling your attention to Defendants' Exhibit R, will you tell me what the figures and lines on that graph represent?

A. The lower graph there, colored in dark red, represents the water pumped by the Vail Ranch. And the upper graph, colored in green, shows the total natural flow of the Santa Margarita River at the Railroad Canyon gauging station, including the water that was pumped by Vail Ranch and the water stored at Lake Vail.

The figures in the left-hand margin show the scale in acre-feet, and the same representation, with respect to the months of the years that are shown, as on the preceding graph.

Q. The purple line, then, on the bottom shows the total water pumped by Vail, as shown by Plaintiff's Exhibit 28; is that correct?

A. That is correct.

Q. And the green line represents the purported flow at the Railroad Canyon gauging station, plus the water which was extracted by Vail by the means of pumps, as shown by [892] Plaintiff's Exhibit 28, plus such waters as were stored by Vail in the Vail reservoir, as shown by Plaintiff's Exhibit 7?

A. That is right.

(Testimony of Dave Lynam Caldwell.)

Q. And I believe that you have indicated on the graph the point of time at which the gates were closed at the Vail dam and the first water was stored there, which was in December, 1948, according to the testimony in this case.

A. That is right.

Q. Now, Mr. Caldwell, calling your attention to the graph which is in evidence as Defendants' Exhibit S, will you tell me what the figures and the lines on that graph represent?

A. The graphs on this chart show the monthly averages arrived at from Exhibit R. Shown, again, on the left-hand margin is the scale in acre-feet and the months of the year, starting with October 1st and ending September 30th.

The lower graph, colored in green, shows the average monthly water pumped by Vail Ranch, which is obtained by taking the amount of water shown on Exhibit No. 28 for each month, and dividing it by the number of months. I believe that was for a 25-year period.

The middle graph, colored in red, shows the total natural flow, and the average monthly acre-feet, which was also taking from the values shown in Exhibit R. [893]

Q. Exhibit 14?

A. Which would be obtained from Exhibit No. 14. And the graph colored blue shows the prospective use of water for the Vail ranch as testified to by Mr. Hall as a total of 79,514 acre-feet per year, which is a figure furnished by Mr. Hall and I took

(Testimony of Dave Lynam Caldwell.)

the same percentages that were shown monthly over the 25-year record on Exhibit No. 28 and applied those same monthly percentages to the total of 79,514 to arrive at the figure for each month.

Q. And I believe that the figure of 22,053 acre-feet which appears after the words "total natural flow", represents the average annual natural flow for the 24 and 25-year period which you used?

A. That is correct. That is the summation of the individual monthly average figures.

Q. Now, Mr. Caldwell, calling your attention to Defendants' Exhibit T, will you tell us what the lines and figures on that graph represent?

A. This graph represents the monthly average taken from Exhibit Q. The lower line colored in green represents the average monthly amount of water used at Camp Pendleton as shown by the table 7 sheet No. 1.

The second line colored in orange-red shows the average monthly usage of water at Camp Pendleton as shown by a combination of Exhibits 26 and 27. [894]

The graph colored in purple shows the average monthly flow of the river at Ysidora station between the years 1924 and 1951 as determined from Exhibit No. 14.

The upper graph outlined in blue is the average monthly flow including the diversions by Pendleton pumps as shown by Exhibit 26, and the Ysidora pumps as shown by Exhibit 27 and the Vail

(Testimony of Dave Lynam Caldwell.)

pumps as shown by Exhibit 28 and by the Vail storage as shown by Exhibit 7.

Q. Now will you give us what the line, which is kind of yellow-orange and has an arrow showing prospective agricultural demand represents?

A. That is the graph showing the monthly figures as furnished in Exhibit No. 38 showing the prospective agricultural demand to be a total of 69,231 acre-feet per year.

Q. So that the line which is a purple-red or purple line, which is flow measured at Ysidora station, represents the actual recorded flow over the period, the actual average—strike that, please.

That line represents the average monthly recorded flow at the Ysidora gauging station?

A. That is right.

Q. And the line which is in blue represents what the actual recorded flow would have been had not the Vails or the O'Neills diverted the water which is represented by Exhibits 26, 27, 28 and 7? [895]

Mr. Shryock: Could I have that question read, please?

(Question read.)

The Witness: That is correct with the qualification that the total natural flow of the river would presume to include the diversions of the Fallbrook Public Utility District and the Naval Ammunition Depot and the hospital.

Q. (By Mr. Dennis): You didn't take those into consideration? A. No.



(Testimony of Dave Lynam Caldwell.)

Q. And you didn't take into consideration any evaporation losses at the Vail dam?

A. No, nor any diversions from the river through O'Neill ditch.

Q. And you did not take into consideration any foreign water that may have been discharged into the basin by reason of sewage effluent which had been pumped into the basin by the plaintiff?

A. No, no figures of that nature were included.

Mr. Dennis: That is all.

Cross Examination

Q. (By Mr. Shryock): Mr. Caldwell, as I understand it then all of these exhibits are based on exhibits which have been furnished by the plaintiff or a table accompanying answers to interrogatories which were adopted by the defendant as an exhibit, plus [896] certain testimony in the record which I understand you have examined?

A. That is correct.

Q. And in a sense we may say that all of these exhibits are mere transpositions into other forms of information which is already before the court, is that correct?

A. That is correct.

Q. And do you feel, Mr. Caldwell, that these exhibits are reasonable accurate—that is that they do reflect the information taken from the plaintiff's exhibits and that they are produced with reasonable accuracy?

A. That is correct.

Q. Let us examine Defendants' Exhibit P for a moment. Now, I believe, sir, in describing the sources of information for that exhibit you stated

(Testimony of Dave Lynam Caldwell.)

that you looked at sheet No. 1, table 7, of the answers to interrogatories, is that correct?

A. Yes.

Q. Which was Exhibit D together with Col. Robertson's testimony? A. That is correct.

Q. And did you examine all of Colonel Robertson's testimony? A. No, I did not.

Q. Well, how much of it did you examine? [897]

A. The portion that recited the number of men in the camp during the years that are shown on the graph.

Q. Well, do you believe, for example, that you looked at page 669 of the record where Colonel Robertson made the following statement:

"I examined the records at headquarters and determined that the population at its peak was approximately 56,000 military." Did you examine that, do you recall?

Mr. Dennis: Just a second until we get the correct volume.

Mr. Shryock: Volume 6.

Mr. Dennis: Yes.

(Document handed to the witness.)

Mr. Shryock: Perhaps your page may be different from mine. Yes, that is right. Do you recall having examined that portion of the record of Colonel Robertson's testimony?

The Witness: With reference to the peak of 56,000?

Q. (By Mr. Shryock): Yes, the sentence which you are now reading.

(Testimony of Dave Lynam Caldwell.)

A. Yes, I am trying to see if it shows there what year that was.

Q. And later I asked the Colonel, and that would have been during one of the years 1943-1944 or 1945, to which the answer was: [898]

"It was late 1944."

The Court: I think he was testifying as to the peak.

Mr. Shryock: Yes.

The Witness: I see I have a figure plotted on here.

Q. (By Mr. Shryock): I asked you did you examine that part of Colonel Robertson's testimony when you were preparing Exhibit P?

A. I believe so. I know I read through the part that recited the number of men that are shown in the camp here and I don't see the other figure. It appears that it was plotted on the graph, 56,000 and was taken into consideration.

Q. Well then, returning to Exhibit P. The yellow line which purports to indicate the number of individuals at Camp Pendleton during the years '43 to '52, is it not correct that the peak you reach in 1944 is some 40,000 individuals?

A. Yes, the peak shown on the graph is 40,000.

Q. Does the figure of 56,000 make any difference in your approach to the orange line you have graphed in there?

A. Yes; it would make a difference. That should be shown definitely to be a higher point on the graph than what has been depicted here.

(Testimony of Dave Lynam Caldwell.)

Mr. Shryock: Thank you very much, Mr. Caldwell.

Redirect Examination

Q. (By Mr. Dennis): Mr. Caldwell, in preparing the line which is yellow, did you use the peak figures for the year, or did you use the figures which Colonel Robertson testified to were the average for the year?

A. Let's find that in the testimony here.

Mr. Shryock: Well, isn't the witness able to answer what he used?

The Court: Evidently, he isn't. He wants to know what the Colonel testified to, but he is asking as to whether you, in making the graph, took the 40,000 to be the average figure.

Q. (By Mr. Dennis): Calling your attention, Mr. Caldwell, to page 680, will you say whether those are the figures which you used in preparing the graph?

A. This appears to be it, page 681, where it shows the average for 1943 to be 25,000, and the average for 1944 would be between forty-five and fifty thousand, and the average for 1945 would be 28,000. And then, as to those [900] figures, as I recall it, there was something testified as to the number of civilians that were also included.

The Court: That still does not answer the question as to the average you used.

Mr. Dennis: I think the witness just stated that he used the figures which appear on page 680 in preparing the chart.



(Testimony of Dave Lynam Caldwell.)

The Court: And did not use the average?

Mr. Dennis: I think you would have to read Colonel Robertson's testimony, that those were average figures. However, I don't think the witness knows whether they were average or peak figures. He used those figures in preparing the graph.

The Court: All right. Anything further?

Mr. Dennis: That is all.

### Recross Examination

Q. (By Mr. Shryock): Now, suppose we read this to you, Mr. Caldwell, as long as we are taking Colonel Robertson's average figures, at page 682:

"Q. Now, for 1944 have you an estimate?

"A. An average would be between forty-five and fifty thousand, and a peak of 56,000 military." That is at lines 4 and 5. Is that one of the averages that you referred to?

A. As I said before, here it appears that the figure [901] shown for 1944 is not shown correctly. It is shown at 40,000, and the average shown here by Colonel Robertson is 56,000. That would have the effect of showing a better utilization of water than what is actually shown on the lower graph, which is the important part of the study. That shows that the use of water at that time was very efficient, during the first years of the camp, and it would be even more efficient than is shown on the lower graph.

Mr. Shryock: I am sure we appreciate that compliment, Mr. Caldwell.

The Court: All right.

Mr. Shryock: Your Honor please, may I say that I seriously doubt whether we shall have much more recross examination, but I should like to point out the fact that these five exhibits, which contain a considerable amount of detail, have just this moment been submitted to us, and we should appreciate the privilege of examining them in a little more detail during the noon hour.

The Court: I will tell you that while you are trying this case our mutual friend—and I say “mutual friend” without tongue in cheek, because Phil Swing and I have been friends for many years—is giving me trouble, as I have just received from Washington a letter from the Attorney Geenal, with all sorts of documents which I have to sign and see that they get to the Court of Appeals. If Mr. Swing [902] were here, I could serve him with his copy and save us the trouble of filing an affidavit of service in serving it by mail, but he is not physically present at this time. So I will have to busy myself at this hour in getting these things out, because Friday is the 21st. So I have no objection to taking our recess now, and if at 2:00 o'clock you want to recall the witness for further cross examination, that will be all right.

Mr. Dennis: I have no objection to that.

Mr. Shryock: All right.

(Whereupon, at 12:03 o'clock p.m., Wednesday, November 19, 1952, a recess was taken until 2:00 o'clock p.m. of the same day.) [903]

Wednesday, November 19, 1952, 2:00 p.m.

Mr. Dennis: Mr. Caldwell, will you resume the stand?

DAVE LYNAM CALDWELL

having been previously sworn, resumed the stand and testified as follows:

Cross Examination—(Continued)

Q. (By Mr. Shryock): Mr. Caldwell, will you refer to—I take it, your Honor wants us to begin.

The Court: Yes, sure.

Q. (By Mr. Shryock): Will you refer to Defendants' Exhibit R and——

A. I have Exhibit R.

Q. ——and the green line is the top line shown on that exhibit, is it not?      A. Yes.

Q. And that is entitled "Total natural flow of Santa Margarita River at Railroad Canyon gauging station," and underneath: "Includes water pumped by Vail Ranch and waters stored at Lake Vail."

Now of course, before Lake Vail was in existence, that would not be applicable, that last comment, would it?      A. That is right.

Q. But as to that portion of the green line up until [904] the end of the 1940's the figures included there were taken from Plaintiff's Exhibit 14, which were the U.S.G.S. records of flow at that gauging station, is that correct?

A. I don't follow you. At first you said something about to the end of 1940.

(Testimony of Dave Lynam Caldwell.)

Q. Well, in other words, prior to Lake Vail?

A. Yes.

Q. In order to arrive at the figures which you gave us your green line included, first, the flow shown by the gauging station at Railroad Canyon, is that correct?     A. That is right.

Q. And then you included water pumped by the Vail Ranch which you obtained from Plaintiff's Exhibit 28, is that correct?

A. Yes, sir, that is right.

Q. And adding those two you got the total figure which you represented by the green line?

A. To represent the total natural flow of the river.

Q. Total natural flow at that point, at the gauging station?     A. That is right.

Q. Did you make any deduction for returned water in making that computation?

A. No, there was no deduction made for any returned water.

Q. And yet the water pumped by the Vail Ranch was in some instances a very considerable percentage of your total [905] figure, was it not?

A. That is right.

Q. And returned water is certainly a matter for consideration in figuring sources of water, is it not?     A. I don't know as to that.

Q. You are not familiar with that?

A. No.

Q. With returned water in irrigation practice?

A. I am familiar with the term but I wouldn't



(Testimony of Dave Lynam Caldwell.)

know as to how much returned water there was in this instance.

Q. Well, if for example let us say one out of——

Mr. Dennis: May I ask a question? There has been no evidence in this case that there is any returned water from either the Vails or from the Government pumping other than the sewage effluent which is pumped over into the basin. Am I correct on that?

Mr. Shryock: I am not so sure there hasn't been. There is evidence that there is extensive irrigation on the Vail lands.

Mr. Dennis: But I don't believe anybody the Government introduced, introduced any testimony to the effect there was any returned water.

Mr. Shryock: Well then, again let me——

The Court: I don't think it has been measured but I think there are facts from which you can infer that some of [906] this water used for irrigation is returned to the basin.

Q. (By Mr. Shryock): And then just to make it clear, no part of any possible returned water from the Vail use for irrigation was deducted from your total figure of natural flow at the gauging station? A. That is right.

Q. And if that is true then, of course, it would be equally true, would it not, at least equally true for Exhibit Q, namely, the natural flow at the Ysidora gauging station? A. Yes.

Q. Because that would include no return water

(Testimony of Dave Lynam Caldwell.)

from the Vails and no return water from anywhere else, would it?

A. That is right.

Q. And would not the same comment in effect apply, if you will look at Exhibit T, to the blue line showing the total natural flow at Ysidora station including Pendleton pumps, Ysidora pumps, Vail pumps and Vail storage?

A. It is true with a modification that might be made with respect to Vail storage and that should have been pointed out on the previous exhibit because that is involved in Exhibit R as well as in Exhibit T—that during the period of years that the Vail dam was storing water in Lake Vail there were 11 months in which instead of being a gain in the water stored behind the dam there was a loss in water and it was presumed that that was water that was released from Lake Vail and those figures were deducted from the total natural flow of the river as shown on Exhibit R and also on Exhibit T.

Q. Now, does Exhibit T purport to cover that same period of 20-odd, almost 30 years, reflected in Exhibits Q and R? I beg your pardon. The ten years from 1942 on reflected in Exhibits Q and R?

A. Well, the 10 years are reflected, also the additional period of time that we had readings on the total flow of the river as gauged by the U.S.G.S. and the period of time that we had readings on the water pumped by Vail. [908]

Q. And in those exhibits the Vail dam is a fac-

(Testimony of Dave Lynam Caldwell.)

tor in only the last two or three years; isn't that correct?      A. Yes.

Q. Mr. Caldwell, did I understand that you are the president of the defendant Santa Margarita Mutual Water Company?      A. Yes.

Q. Did you participate in any way in the decision to make an application for 60 cubic feet per second for your company—an application to the State for a permit to divert 60 cubic feet per second from the surface flow of the stream?

A. No, I have been a director of the Santa Margarita Mutual Water Company since that time.

Q. You mean you played no part in making that decision?      A. That is right.

The Court: You mean you became a director after that, since that time?

The Witness: Yes.

Mr. Shryock: No further questions.

#### Redirect Examination

Q. (By Mr. Dennis): Mr. Caldwell, during the noon recess did you have a chance to check the record and ascertain what figures were used in connection with plotting the curve which was shown on Defendants' Exhibit P? [909]

A. Yes, I had a chance to check that, and found there was that one mistake.

Q. Will you explain to the court and to counsel what figure you used, and how you obtained that figure?

A. Yes. The figure that should have been plotted

(Testimony of Dave Lyman Caldwell.)

for 1944 was the figure recited on page 682, line 4, which showed the average usage was forty-five to fifty thousand acre-feet, and we used the 50,000 figure in recalculating it, and it results in an average usage of 20.2 individuals per acre-foot instead of 16.2, as shown.

Q. Will you tell how you obtained the other figures which are shown on that graph?

A. Yes. Starting with the year 1943, the figure shown there was obtained from page 681, line 17, of 25,000 individuals. From the year 1945—

Q. Will you now also tell the court where you obtained that figure? I mean the page number and the line.

A. At page 682, line 7, it shows 28,000 military men, and on the same page, at line 10, it shows 1,800 dependents, or 29,800 total, and that is the figure that was plotted.

In the year 1946, on page 682, line 13, it was stated that there were 11,000 military men and 2,200 dependents. That latter figure is shown at page 682, line 11. That makes a total of 13,200, which figure was plotted.

In the year 1947, on page 682, line 15, there is recited [910] 13,000 men, and, on line 11, 2,200 dependants, or a total of 15,200.

For the year 1948, at page 682, line 17, it shows 13,000 men, and at line 11 shows 2,200 dependents, a total of 15,200, the same as for 1947. Both of those figures are plotted for those two years.



(Testimony of Dave Lyman Caldwell.)

For the year 1949, on page 682, line 19, it shows the figure of 19,000 military men, and at page 683, line 8, it shows 2,550 dependents, or a total of 21,550, which figure was plotted.

For the year 1950, on page 682, line 22, it shows a total of 24,000 military men, and at page 683, line 8, it shows 2,550 dependents, or a total of 26,550, which figure was plotted.

For the year 1951, at page 682, line 24, it shows 28,000 men, and on page 683, line 8, it shows 2,550 dependents, or a total of 30,550, and that figure was plotted.

For the year 1952, on page 683, line 5, it shows a total of 53,000 men, and on the same page, line 8, it shows 2,550 dependents, or a total of 55,550. And I see that is marked on the chart as 55,250, so that should read 55,550, which is essentially the same figure that is plotted.

Q. Mr. Caldwell, have you ever had occasion to testify in a court of law before? A. No.

Mr. Dennis: That is all.

#### Recross Examination

Q. (By Mr. Shryock): Mr. Caldwell, are you now telling us that your figure of 40,000 for the year 1944 is correctly plotted, and that you do adopt it, and that you base it on line 4 of page 682?

A. No. I said that on page 682, line 4, is shown an average of 45,000 to 50,000 men, and that the 50,000 figure should properly be plotted on there, and I have changed it on this graph to read

(Testimony of Dave Lyman Caldwell.)

"50,000," and that changes the average individuals per acre-foot from 16.2 to 20.2.

Q. You were in error on that?

A. Yes, I was in error.

Mr. Shryock: All right, sir. Nothing further.

Mr. Dennis: That is all.

The Court: All right, Mr. Caldwell.

(Witness excused.)

Mr. Dennis: Your Honor please, at this time I want to offer in evidence the application of the Santa Margarita Mutual Water Company, Application No. 12152, as defendants' exhibit next in order. I believe it is U.

The Court: All right.

The Clerk: Exhibit U in evidence.

(The document referred to, marked Defendants' Exhibit U, was received in evidence.)

Mr. Dennis: I also want to offer in evidence Application No. 11578, which is an application by the Santa Margarita Mutual Water Company, as Defendants' Exhibit V.

The Clerk: Is this last admitted, your Honor?

The Court: It may be received.

The Clerk: That is Defendants' Exhibit V in evidence.

(The document referred to, marked Defendants' Exhibit V, was received in evidence.)

Mr. Shryock: And those two exhibits, Mr. Dennis, are the ones listed on page 67 of the pretrial order——

Mr. Dennis: I believe so, yes.

Mr. Shryock: —as Exhibits B and C of the Santa Margarita Mutual Water Company?

Mr. Dennis: Yes. I have here the affidavit of Max Bookman, who states that he is the Enigneer-in-charge of the Southern California Office of the Division of Water Resources of the Department of Public Works of the State of California; that he has examined the official files of the Division of Water Resources relating to Applications 11578 and 12152 of Santa Margarita Mutual Water Company and Application 12576 of the U.S. Navy Department to appropriate unappropriated water, and finds that said applications are still pending before the Division of Water Resources and are in active status.

That official action of the Division of Water Resources [913] with respect to said applications is being postponed pending the decision of the United States District Court for the Southern District of California in the case of United States of America vs. Fallbrook Public Utility District, et al., No. 1247-SD Civil.

The Court: All right. [914]

Mr. Dennis: I think that plaintiff has agreed we can stipulate that if Mr. Bookman (phonetic) was called he would so testify.

Mr. Shryock: We will so stipulate.

The Court: All right.

Mr. Dennis: I will introduce the affidavit as our next exhibit in order.

The Court: It may be received.

The Clerk: Defendants' Exhibit W in evidence.

(The document referred to was marked Defendants' Exhibit W and received in evidence.)

Mr. Dennis: There is just one other thing before I call Mr. Conkling.

I believe that counsel for plaintiff and myself have agreed that we can stipulate that when Colonel Robertson was testifying at page 676, line 25 to line 5 on page 677, that wherein he used the word "Camp Pendleton" he was referring to all of the military reservation—the United States Naval Ammunition Depot and United States Naval Hospital and Camp Joseph H. Pendleton in its entirety, is that correct?

Mr. Shryock: That is correct, we can so stipulate?

The Court: All right.

Mr. Dennis: And I would at this time like to offer in evidence a copy of the rules and regulations and information pertaining to the appropriation of water in California, being [915] a portion of the California Administrative Code, Title 23, Waters.

The Court: All right, it may be received.

The Clerk: Defendants' Exhibit X in evidence.

(The document referred to was marked Defendants' Exhibit X and received in evidence.)

Mr. Dennis: Mr. Conkling.

### HAROLD CONKLING

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Harold Conkling.



(Testimony of Harold Conkling.)

Direct Examination

Q. (By Mr. Dennis): Mr. Conkling, where do you reside?

A. In Los Angeles, California.

Q. And do you have a business address?

A. Yes, 448 South Hill, Los Angeles.

Q. And what is your business or profession?

A. I am a consulting engineer, specializing in water matters and especially hydrological matters.

Q. Now, you have a grade school and high school education? A. Yes, I do.

Q. And following that did you attend a university or [916] college? A. Yes, I did.

Q. And what college did you attend and what did you specialize in?

A. I took a civil engineering course at the University of Nebraska and at Cornell University in New York.

Q. And after you left college what did you do?

A. Well, after a few years of what you might call a journeyman engineer I got a job with the United States Reclamation Bureau in Boise, Idaho, and was with the Reclamation Bureau for 11 years—that is until the fall of—until the spring of 1921, at which time I resigned and came to California and got a job with the State Division of Water Rights, which was later amalgamated with the State Engineer's office and became the Division of Water Resources.

I remained in the State service until May, 1945, at which time I left the service and established

(Testimony of Harold Conkling.)

an office as consultant in Los Angeles and I am still active in that.

Q. Did you say 1945?

A. 1945, yes.

Q. And what were your duties while you were with the Reclamation Bureau?

A. Well, they were various and sundry but finally in the latter years that I was with them I was in charge of general investigations for development of entire stream systems. At that time, when I first went with them, they [917] took isolated projects but after I had got into the investigational work it was found necessary to take entire stream systems before you could conveniently and economically lay out a project and that was my work during the latter years.

In that period I investigated and made a general plan for the development of the Humboldt River in Nevada and for the North Platte River in Colorado, Wyoming and Nebraska, and the upper Rio Grande. That wasn't definitely a plan but it pointed to a plan.

And here in California the development of the waters of Mono Basin to bring it through the range, the divide into Owens Valley for utilization for irrigation in Owens Valley.

I made the studies on the Colorado River which were embodied in the Fall-Davis Report, which was published as Senate Document so and so, and which was used for the Colorado River compact, which was later developed on that basis.

(Testimony of Harold Conkling.)

Then I did other work but the work that most closely ties into this present or in this particular irrigation project here on the Santa Margarita is that which I have outlined.

Q. Now, while you were with the State what did your duties principally consist of?

A. When I came with the State and from 1921 to 1927, I was on the investigation of large projects which were before the State and the Federal Power Commission for the development of power projects primarily in the Sierra Nevada Mountains and [918] then I made this, or, started this investigation of the San Gabriel River which was in connection with an application by the City of Pasadena to appropriate from the San Gabriel River, which embodied the usual difficulties in determining how much water belonged to the prior rights, due to percolation from the river and how much could be diverted.

The city finally gave up the project.

Then in 1927 I was appointed chief of the Division of Water Rights in charge of the water rights in the state—that is, in charge of the applications to appropriate water and also of the adjudications.

In 1929, as I say, the Division of Water Rights was amalgamated—united with the State Engineer's office and I became deputy state engineer.

From then on until I resigned I was in charge of some of the statewide investigations for development of projects and also handled 31 adjudications of stream systems, mainly in the north but one in

(Testimony of Harold Conkling.)

Southern California. That was the Raymond Basin investigation which was the case of Pasadena versus Alhambra, et al., and had to do with the adjudication of underground water rights and which in its fundamental features partakes a good deal of the nature of this—any one of these ground water basin projects like the Santa Margarita River.

Then I had charge of snow surveys and got out a lot of bulletins, some of which I wrote myself, the San Gabriel [919] investigation and so on.

There was a lot of work in conjunction with the Government—especially the organization which is now called the Soil Conservation Service on getting the consumptive use of the different crops and of the different types of native vegetation for the development of the—oh, the best development and most methodical development of these combination surface and underground water supplies and, well, this in a general way.

I might say that in Southern California here in connection with that we spent a good many years under an appropriation which was promoted by the Chamber of Commerce and others in Southern California, toward an intensive investigation of the underground basins of Southern California and their best utilization and how we could make the most out of them.

Do you want me to go on? I don't want to say anything more about that.

Q. Well, when you mentioned that you handled



(Testimony of Harold Conkling.)

the adjudication of stream systems, what were your duties in connection with that?

A. In the water code the Division of Water Resources is authorized to obtain the facts as to a stream system or as to any kind of a court action if it is referred to them by the court, or under another procedure, it being on petition of a certain percentage of the water users on a stream system [920] and then start obtaining those facts itself and lay them before the court after they have obtained it. That latter is called the statutory procedure and the other is called the court reference procedure. The methods seem to be quite salutary because in practically all cases when it went to the court it went to—when these cases went to court they went to court with a stipulated judgment as to all the water rights.

I don't mean to imply at all that the State does any of the adjudicating but it does and did develop the facts in a comprehensive manner in these cases.

Q. Now, have you had an opportunity to, or, have you during the course of your professional career had the opportunity of investigating or in making any reports on any streams in Southern California which are located in what is generally known as the Southern California coastal basins?

A. Yes. I have done quite a lot of work as represented by the Santa Ynez District upon the Santa Ynez River in Santa Barbara County in connection with the development of Cashuma (phonetic) reservoir by the United States Reclamation Bureau, which proposes to take water from the Santa Ynez

(Testimony of Harold Conkling.)

watershed through the mountains, Santa Ynez Mountains, Santa Ynez mountain range onto the coastal plain—Santa Barbara and Carpinteria and in through there.

That, of course, aroused considerable fear on the part [921] of the water users lying below the reservoir which in this case is almost all the water users in the basin.

The Reclamation Bureau together with myself worked out a plan by which the local water users could be relieved of any fear that they wouldn't get the water that belonged to them naturally.

And I am talking now of my work since I left the State service.

I laid out a comprehensive plan in Ventura County for the development of the Santa Clara River watershed which is the largest watershed in the County and also the Ventura River watershed, which is the watershed which drains Ojai Valley and comes down through the City of Ventura.

In each one of those cases, but more particularly in the Santa Clara, the project as developed and which is to be voted on for a bond issue in December was to build a reservoir upon one of the larger tributaries of the river and then store that water until it could be released and put underground further down in the valley, which is something, as I understand it, as is proposed in this case by Camp Pendleton.

With the other streams in Southern California I have become very familiar in other work since

(Testimony of Harold Conkling.)

then—since I left the State and in work which I did before I left the State.

At the present time I am working on an investigation on the Santa Ana River in the upper basin—that is in Riverside [922] and San Bernardino Counties to find out whether they can augment their water supply from local sources or must come into the Metropolitan Water District. [923]

Q. Have you had an opportunity to make investigations or supervise investigations of other underground water basins in Southern California and in the San Diego basin?

A. For adjudication?

Q. No, just investigation.

A. Every underground basin in Southern California, except all of the San Diego basin. Yes, the entire Southern California area has been under my investigation, intensive investigation.

Q. Does that include what is commonly known as the West basin?

A. Oh, the West basin, that is a part of this general area. Since I left the State, I did make—I would hardly call it an investigation because I knew all about it beforehand, but I made a report for the West Basin Association, which was advisory as to whether they should try to get a supplemental supply of water. That is the area around Santa Monica southward along the coast to Long Beach.

Q. And have you from time to time been the author of certain bulletins which have been pub-

(Testimony of Harold Conkling.)

lished by either the State or the Federal Government?

A. Well, I have several bulletins published by the State. None published by the Federal Government. I have this report on the San Gabriel investigation, the Ventura County investigation, the Mojave River investigation, the [924] Salinas Valley investigation, and some others possibly by myself. Those are investigations in which we had to determine the general plan for the water supplies.

Q. Have you been in charge of investigations and supervised reports which have been written by subordinates, which have been published by the State of California?      A. Yes.

Q. Can you give us a few of the principal ones?

A. Oh, the Santa Ana investigation, the Santa Clara County investigation, several bulletins on this general Southern California, which we call the South Coastal basin, and, also, as a representative of the State, worked with, or at least represented the State on bulletins which were written by government agencies but published by the State, having to do with this general subject, in Southern California entirely.

Q. I wonder, Mr. Conkling, if you could give the names of several of your important clients that have utilized your services.

A. Well, the City of Los Angeles Department of Water and Power, in trying to find a way to utilize the San Fernando Valley as an underground reservoir, which I think we are, for a terminal



(Testimony of Harold Conkling.)

storage, importing water in, if necessary, for better and more logical development of the local supply. The West Engineer Department of Central [925] California; the Santa Ana Water Association; the State Division of Water Resources; Santa Clara Water Conservation District; Ventura County; Ventura County Flood Control; California River Board, State of California, and that was in connection with this Arizona project; San Bernardino Valley Water Conservation District; City of San Bernardino; Southern California Edison Company; City of Sierra Madre; and so on.

Q. Did the United States Department of Justice ever employ you and utilize your services?

A. Oh, yes. Upon the San Joaquin River, in connection with certain suits, what they call the Gerlach suits, brought against the Government for damages, and also at the present time I am on this Rank vs. Krug, representing the Federal Government in that suit. That is on the San Joaquin River, too, and has to do with percolation, primarily, on the San Joaquin River.

Q. Have you ever had occasion to testify in a court of law as an expert witness?

A. Yes. I testified—I represented the State of New Mexico before the Supreme Court of the United States on the Texas vs. New Mexico, over the waters of the Rio Grande. I represented the Department of Justice in Nebraska vs. Wyoming, over the waters of the North Platte. The United States interpleaded—intervened, I guess. [926]

(Testimony of Harold Conkling.)

And then several times in the state courts here. Not very many.

Q. Have your qualifications as an expert ever been questioned? A. No.

Mr. Dennis: Counsel, do you desire to ask any further questions?

Mr. Shryock: No questions.

Q. (By Mr. Dennis): Now, Mr. Conkling, at the request of the Santa Margarita Mutual Water Company, have you made any investigation of the Santa Margarita River and the problems that exist in that watershed? A. Yes, I have.

Q. What have you done?

A. Oh, I have taken the data which was available, as furnished by Camp Pendleton and by the Vail interests and by the U. S. Geological Survey, and analyzed them thoroughly. And what I have really done is to try to find out how much water would be available to Camp Pendleton if during the past period of record the Vail dam had been constructed and was being fully utilized, and if the proposed Fallbrook reservoir of 70,000 acre-feet capacity had been developed and was being fully utilized to its fullest possibilities. That is, I have done it that way, because I thought I could approach more readily the fundamental and important items which are in the [927] case rather than to spend my time on unimportant items.

Q. In connection with those studies have you prepared a brochure, which is composed of bar graphs, reports, and tables and maps?

(Testimony of Harold Conkling.)

A. Yes, I have.

Q. Do you have that with you?

A. Yes, I have.

Mr. Dennis: I have heretofore furnished counsel for the plaintiff and the Court with a copy of that brochure, and I would like to offer it in evidence as Defendants' Exhibit, I believe, Y.

The Court: Then we will number as a part of Y, as Y-1, and so forth, the various 14 exhibits which you have attached to this.

Mr. Dennis: Yes. Mr. Conkling has given each exhibit a number.

The Court: There are 15. We will mark them under that letter, 15 under that letter.

(The documents referred to, marked Defendants' Exhibits Y, Y-1 to Y-15, inclusive, were received in evidence.)

Q. (By Mr. Dennis): I believe, in addition to that, you have prepared another bar graph showing the discharge in acre-feet on the Santa Margarita River.

A. That is right. I have left a blank in this volume for that exhibit, which is No. 9, but it was a little large [928] to put in here.

The Court: All right. That will go in, then, as Y-9.

Q. (By Mr. Dennis): Do you have additional copies of that bar graph with you now?

A. I have one with me.

Q. You have just one?

A. Yes. That is the first thing (indicating).

(Testimony of Harold Conkling.)

The Court: I don't need any, gentlemen, because ultimately, when I work on the case, I will have the original exhibits. So those that you give me to use while the testimony is going on, I will return to you. Here, I will return to you my copies that were furnished this morning.

Mr. Dennis: We have plenty of those, your Honor.

The Court: I will return them. They just clutter up my desk.

Mr. Dennis: I think that Mr. Wright wanted a copy of these, so I will give them to Mr. Wright.

Mr. Shryock: I take it, if your Honor please, that as to any of these exhibits, at an appropriate time we would always be in a position to make a motion to strike?

The Court: Oh, yes. They are merely introduced because he is going to refer to them as he testifies.

Mr. Shryock: Yes, sir.

The Court: This is a manner of identifying them.

Mr. Shryock: Yes, sir. [929]

The Court: And then, as each of them comes up, if you have any objection, you may present it. I think they are merely to illustrate the testimony he is to give.

The Witness: That is correct, your Honor, yes.

The Court: They are diagrams and other things to illustrate your testimony?

The Witness: That is the case, yes.

The Court: All right. Let's go on.

Q. (By Mr. Dennis): Mr. Conkling, will you



(Testimony of Harold Conkling.)

explain to the Court what you did in connection with the preparation of these various exhibits, and where you obtained your information, and the conclusions which you draw from them, and the purpose for which they were constructed?

A. I have already stated where I got the information. I will repeat it again.

The Court: You don't have to repeat it.

Q. (By Mr. Dennis): I mean, as to each individual exhibit?

A. Oh, yes. All right.

The Court: Do you want to do as Mr. Caldwell did, take each exhibit and state what it purports to show?

The Witness: I would like to go right straight through, yes.

The Court: Yes. I think that is a very good system, and then you can amplify and fill in. [930]

The Witness: I will just go right straight through and fill in as I go along. I think that would be better.

The Court: Yes, fill in as you go along. That is right.

The Witness: All right. Exhibit 1, as I stated, on the reverse side of the first sheet is the subdivisions of the Santa Margarita watershed, and the isohyets of 67-year mean season, for the period 1883 to 1947.

It occurs to me—I copied this out of the U. S. Engineer Department's report, but it looks to me like it is about 64 years rather than 67. That is a

(Testimony of Harold Conkling.)

photostat of two plats, combined on one photostat, pages 1 and 3 from Appendix 2, Report of U. S. Engineer Department on the Survey Flood Control, Santa Margarita River and Tributaries, of March 15, 1949.

The reason I made this map was to get a general idea before myself and the Court of what the watershed looked like and where the rainfall occurred and where the runoff came from, and, also, to see if I could make an estimate of the amount of water that came off the watershed between the Fallbrook gauging station, which is the next to the lowest gauging station on the stream, or was, at least, during this period, and the Ysidora gauging station, which is the last gauging station on the stream. Water passing the Ysidora gauging station goes out into the ocean as wasted. [931]

So I did succeed in making an estimate of the amount of water that originated below the Fallbrook gauging station, and the total amount in an average period of runoff is 7,410 acre-feet coming from three subdivisions.

But before going into that, I think I should go back on this exhibit and tell more about it.

If you will look up at the top of the tabulation on the page facing the map, you will see that this shows the values for the period 1924-1947, that you regard as a period of average runoff.

I so took it from Bulletin 1 of the State Water Resources Bulletin which has been recently published, which gave estimated values for the runoff

(Testimony of Harold Conkling.)

at each one of the gauging stations on the Santa Margarita River for the period from the water year 1894-95 to the water year 1946-47. That period embraces two periods of drought and two periods of surplus runoff. [932]

The reason I say that is because I suppose everybody knows the precipitation in Southern California comes in a more or less cyclic character, the cycles averaging about 24 to 25 years long in which you will have one period of drought and one period of surplus. That, I say, is the average. And this particular period embraces two of each, drought and a period of surplus.

When that is plotted—when that period is plotted with the accumulated departure from the mean it is found that the period 1924 to 1947 is an average period, and so by taking that period eliminates all difficulties which come about by utilization of any other periods—that is the total period of record.

Going back to the graph now. The subdivision 1 over on the right, "head waters," is the total area above the Vail reservoir on the Temecula Creek.

Subdivision 2 is the total area above the Murrieta gauge, on the Temecula gauge on Murrieta Creek.

Subdivision 3 is the area between those two gauges and the Railroad Canyon gauge.

Subdivision 4 is the area draining to the river between the Railroad Canyon gauge, which is the upper end of the canyon, of the river. Railroad Canyon gauge is at the lower end of the interior valley. And the Fallbrook gauge, which is the third

(Testimony of Harold Conkling.)

gauge down on the river—I say item 4 is the area [933] there between the Railroad Canyon gauge and the Fallbrook gauge.

Item 5 is the area and run-off between the Fallbrook gauge and the proposed DeLuz dam site which is practically at the mouth of this canyon which runs through the mountains from the interior valley to the coastal plain.

Item No. 6 is the area between the DeLuz dam site and the upper end of the O'Neill basin in Camp Pendleton.

And Item 7 is the area between that point—the upper end of O'Neill Basin and Ysidora gauging station which is down at the lower end of the lower basin—that is the Ysidora Basin of Camp Pendleton.

Now, to make it as brief as possible, the area between Railroad Canyon and Fallbrook gauging stations has an approximate 19.8 average annual precipitation according to the U.S.E.D. Isohyete lines—these small lines on this graph. The fine lines are the Isohyets which means the lines of equal precipitation.

The Isohyets show that in the widest part of the watershed the average rainfall, annual precipitation, goes up to 24 inches over there on the north side of the river. But the maximum in the watershed itself on the average is 19.8 inches out between Railroad Canyon and Fallbrook and 19.9 inches between Fallbrook and DeLuz station.

One has an area of 50 square miles and the other



(Testimony of Harold Conkling.)

62 [934] square miles and this area, the run-off between—at Railroad Canyon and the run-off at Fallbrook has been measured for this entire period of 24 years and the average run-off during that period, from that area, was 92 acre-feet per square mile.

Now, the run-off from Temecula Creek above the Vail reservation was about 34 acre-feet per square mile with a precipitation of 16.4 inches, and the Murrieta Creek with a precipitation of 15 inches was 39 acre-feet per square mile.

Well, using those unit values and the precipitations as given by the isohyets in the lower basins, I estimated the acre-feet per square mile from the different basins and below Fallbrook and above Ysidora and got 7,410 acre-feet. That is to be used afterwards. You understand the material here is more like a report on a development of a river system than ordinarily given in testimony of this kind.

And so we build up the basic data first and draw some conclusions later on.

Exhibit 2 gives the sewage return from Camp Pendleton to Santa Margarita in terms of million gallons which was given by the—which is the term in which it was given by the Camp Pendleton testimony, by Plaintiff's testimony, and that is changed into acre-feet.

Down at the bottom of the page I have given the averages [935] for 1943 to 1947; 1943 to 1952 and 1951 to 1952. 1943 to 1947 has the most meaning for this report although and I shouldn't quite say that,

(Testimony of Harold Conkling.)

1951 and '52 also do. I had to estimate it for a couple of months in 1952—August and September because I didn't have the data.

Exhibit No. 3 gives the total pumpage by Camp Pendleton and by the Navy Department from the river beginning with 1942-43 and ending with 1951-52. That is a period of 10 years. It gives the average for '43-'47 and the average for '43-'47 is 5,490 acre-feet and the amount for 1951-52 is 5,970 feet.

Exhibit 4 gives the water used in millions of gallons per day per capita or in gallons per day per capita for three cities in Southern California. The cities are Santa Ana, Santa Monica and Los Angeles.

This was taken from the reports of the Metropolitan Water District and in many cases the reports they have in there are possibly not authentic but these three cities, I am sure, are quite authentic.

Now, this use of water per capita is as stated in the text or the table and involves the use in residences and residential lawns and gardens, fire fighting, street cleaning and washing, parks and cemeteries. In other words, it is the gross use of water.

It turned out to be 137 gallons per unit of population in Santa Ana; 133 in Santa Monica and 147 in Los Angeles, which [936] is probably affected somewhat by the fact that a considerable part of that is in the San Fernando Valley where it is quite hot and by the large suburban traffic which comes into the city every day to work. But I regard

(Testimony of Harold Conkling.)

the City of Santa Ana use as more nearly like, as far as climate is concerned, is more nearly like Camp Pendleton than either of the others.

I note in the application to appropriate which has been made by the Navy and in protest, that they use the value of 100 gallons per day per capita as what is needed for the camp, which is logical to assume that a smaller amount would be needed by the camp than for a city because of the larger area of lawns in a city compared to the population.

Exhibit 5. Now, I haven't stated as I went along what exhibits these came from but I will go back right now and do so.

Exhibit 1, that data came from United States Water Supply paper, Plaintiff's Exhibit No. 14, and Mr. Hall's testimony which amplified—gave some more recent data than was available in the other.

Exhibit 2 of Defendant's is from Plaintiff's Exhibit 22.

Exhibit 3 of the Defendant is from Plaintiff's Exhibits 26 and 27.

I already explained what Exhibit 4 is. That is from the Metropolitan Water District publication and annual report for 1951 or—it was published in 1952. I have forgotten what [937] year it was for, whether it was '50-'51 or for the calendar year '51.

Exhibit 5 is from Plaintiff's Exhibit 28 and is merely the use of water for irrigation on the Vail Ranch in acre-feet, plus the monthly distribution and per cents.

(Testimony of Harold Conkling.)

Exhibit 6 of the defendant is from pretrial Exhibit 1. Has that been changed? Has an exhibit number been given to that, Mr. Dennis?

Q. There has been an exhibit number given to that now.

Mr. Shryock: See if that wasn't your Exhibit I.

The Witness: Exhibit I?

Mr. Shryock: I am sure that is the one that you later got in as your exhibit.

Mr. Dennis: No, that is not it.

The Witness: I think it is Plaintiff's Exhibit 34.

Mr. Dennis: It is Defendant's Exhibit O.

Mr. Shryock: That is right.

The Witness: Defendants' Exhibit O?

Q. (By Mr. Dennis): Yes, Exhibit O.

A. Well, that is the pumpage of the Fallbrook Public Utility District which, by the way, as I believe was stated this morning, is above the Fallbrook gauging station, and it is in acre-feet and——

The Court: You were talking about 6?

The Witness: That is Exhibit 6. [938]

The Court: All right.

The Witness: And I had to estimate the last year because I didn't have the last two or possibly three months. It may be slightly out. And over on the side is the next average for 4-24-27, which was a normal amount, 74 acre-feet, and '51-'52, 1300 acre-feet.

In Defendants' Exhibit 7 there is a tabulation from the water supply papers of the run-off of Nigger Canyon, Railroad Canyon on Temecula



(Testimony of Harold Conkling.)

Creek and at Fallbrook on Ysidora on the Santa Margarita River in acre-feet.

Now, Exhibit 8 is that same information in graphical form. Had we better put this upon the board? Would you like to look at that, your Honor? I want to get over a certain idea about that.

The Court: All right.

The Witness: Give me one of those backs, will you, Bill?

The Court: All right.

The Witness: This is the graphical expression of Plaintiff's Exhibit 8. It shows by columns whose length is proportionate to the run-off.

The run-off for the Nigger Canyon station—the word “creek” after “Nigger Canyon” is a draftsman's idea. And for Railroad Canyon with also the word “creek” after it and Fallbrook with the word “river” after it and Ysidora with the word “river” after it. Also there are the averages for the [1939] period with a 28 year period, 1924-25 to '51 and '52. What I want to point out there and which this shows instantly if you are trying to get very much yield out of the Santa Margarita River, you have to build a reservoir and a pretty large reservoir and that the capacity of the reservoir must be several times the safe yield you will get out of the reservoir. In other words, if you will take the period from 1927 to 1932 you will see that you would have to lop off and hold over quite a lot of that 91,200 acre-feet that is Ysidora station and carry it over there through 1936 and also if you were going

(Testimony of Harold Conkling.)

to supply the period from 1946 and '51 you would have to do—also take a lot of the storage from these periods—these rather heavy years in 1937 and 1941 and 1943.

The Court: The flood certainly shows up beautifully in 1938, doesn't it?

The Witness: Yes. That was a big one. Now, it doesn't show that you can't use averages in this investigation.

There has been 50,000—there has been proposed on this reservoir on this stream already by two agencies, just leaving out the situation for the moment—the Santa Margarita River—the Santa Margarita, the Fallbrook, proposed Fallbrook dam. It shows there has been proposed, and 50,000 acre-feet has been built, there has to be 238,000 acre-feet of capacity on this stream which means with, 240,000 acre-feet of capacity, you can pretty well control most of these high years. Some [940] of them will escape at that. Well, so much for that. You understand that is historical.

If those years were repeated exactly they wouldn't be the same because the Vail reservoir has been built and would take a substantial average amount away. Most of it would be taken away from these big years.

You understand any storage project depends upon the big years for a supply and the Vail project would take more of the big years and reduce those down to something else—a much smaller quantity.

Exhibit 8 at the time I made this, I had some-

(Testimony of Harold Conkling.)

thing else in mind but I couldn't show this graphically because it was just too big.

Exhibit 9 in the monthly and annual discharge at Nigger Canyon, Railroad Canyon and Fallbrook and Ysidora, but it shows the same considerable diversity and if you examine it closely you will be surprised how many years there was water, how many months was wasting water into the ocean past Ysidora and any water that wastes into the ocean past Ysidora was at that time subject to appropriation.

Now, Exhibit 10 shows what I was just telling about, graphically, and in average form.

It shows that—well, at the top of the page is a line which shows the number of months of record for each one month—that is the number of Januarys they had a record [941] and the number of Februarys that had a record at Ysidora gauging station.

Now, that shows in October, 8 out of 27 months there was flow past Ysidora into the ocean, waste water.

In November, 12 out of 27 months.

In December, 21 out of 27 months.

In January, 24 out of 27 months.

February, 24 out of 27 months.

March, 23 out of 28 months.

April, 22 out of 28 months.

May, 19 out of 28 months.

June, 12 out of 27 months.

July, 4 out of 26 months.

August, 3 out of 26 months.

(Testimony of Harold Conkling.)

September, 4 out of 26 months.

Now, that of course might give a false impression because actually the amount of water that flows into the ocean in some of those months is very small, so you will have to turn over to Exhibit 11. That shows how much in the 28 years of recorded discharge, how much water on the average went into the ocean in each month. As is apparent most of it went into the ocean in January, February, March and April.

Now, this shows again that for utilization of that water it must be conserved even if that was the flow for any one year. It must be conserved. It must be held in reservoirs [942] to the time it can be used and the peak use, of course, is in June, July, August and September.

So, you would have to have quite a lot of storage for very much use of water even if you had a year—every year alike.

Now with this background what I was trying to seek was how much water would go into the ocean with the Vail reservoir built and the Fallbrook reservoir built, so I operated roughly, of course, as to the Vail reservoir under certain assumptions which I have given in Exhibit 12.

If you will read through the first paragraph on that, under No. 1, you will see that the last sentence is not an assumption. That should have been a conclusion.

Well, I assumed that the demand on the reservoir was 7,000 acre-feet. I assumed that you could, if



(Testimony of Harold Conkling.)

you wanted to put it underground—a net demand of 7,000 acre-feet and that pretty well agrees with what the U.S.E.D. decided and with that demand during this period, 1923-24 there was certainly spills which are enumerated at the bottom of the page. Otherwise, except for return flow the water that goes past the Vail reservoir or got to the Vail reservoir was captured and held in the reservoir and then fed out. [943]

Now, the reason for making such a study is to find out how much the stream would be depleted if you had a full supply available to the reservoir, or more than a supply, during such a period. In other words, you make the study to find out if the reservoir can stand such a diversion, and you make a study to find out how much evaporation would occur on the average, to deplete the supply down below, and I found an average evaporation of 2400 acre-feet during the period—it says here 1942-52—it should be 1924-52, in the third paragraph.

I also did not decrease the content by siltation for the period.

Siltation is silt deposits, and estimated by the U.S.E.D. to be about eight-tenths of one per cent of the flow of the stream, which would mean that these reservoirs would be all silted out at the end of a 25-year period, and there would be a fairly large loss in capacity. I haven't tried to figure it out.

Have you any questions about that, your Honor?

The Court: No. Just go ahead.

The Witness: Now, the next step was to find out

(Testimony of Harold Conkling.)

how the operation of the Vail reservoir to the full extent would affect the discharge on the Santa Margarita at Fallbrook.

Now, the assumptions were made as follows: All of that 7,000 acre-feet of safe yield could be consumed by pumping [944] the deep percolation from the irrigation.

An additional 1,000 acre-feet can be developed by pumping the alluvium between the Vail reservoir and Temecula Gorge.

60 per cent of the historical pumpage is assumed to have been consumed by crops on the ranch. The remaining 40 per cent goes downriver past Railroad Canyon gauging station.

The 40 per cent of each year's flow lost downriver is subtracted from the amount of each year's flow caught in the reservoir plus 1,000 acre-feet from other sources to get the net change in stream flow at Fallbrook.

But I think it will be very difficult to operate so that they will ever get that amount. In other words, if you will look down here, in this tabulation, you will find that in the average period, 1924 to 1947, there would have been 8,420 acre-feet consumed over and above the amount historically consumed, and, as I say, I think the difficulty will be so great in ever reaching that figure that it may not, or probably will not, occur. Nevertheless, it is a conservative view.

Now, then, we come to the Fallbrook reservoir. We have a reservoir capacity of 70,000 acre-feet.

(Testimony of Harold Conkling.)

That is the combined figures named in the applications of the Fallbrook Public Utility District and of the Santa Margarita Mutual Water Company.

This reservoir, during the period in which it was operated, between 1924 and 1947, spilled six times, and with an evaporation average of about 2,800 feet a year.

That reservoir has about 1,000 acres of area when full, which is about the same as the Vail reservoir.

Now we come to the pay-off on all this investigation which has gone before. That is given in Exhibit 15. The question is: How much water would there be remaining at Ysidora if these two reservoirs were operating, as shown in the previous pages?

We have a discharge at Ysidora, an average annual discharge for the period 1924-1947, of 31,920 acre-feet, and then we will divert—it says 20,980 acre-feet. It should be 20,880 acre-feet. There is an error of 100 acre-feet there. That is immaterial in that figure.

So that you have left now, in round figures, 11,000 acre-feet average annual discharge past Ysidora, if these two reservoirs were put in and operating, as has been described heretofore. And from that must be subtracted the amount of increase in diversion between, oh, between DeLuz and Ysidora, which has taken place historically during the period, and you finally come up there with one assumption.

You assume that the net diversion for Pendleton prior to the time it was taken over by the Govern-

(Testimony of Harold Conkling.)

ment averaged 2,000 acre-feet per year, and we come up then with—to [946] bring it up to date, we come up with 1,320 acre-feet, which must be subtracted from the previous figure of approximately 11,000 acre-feet. So we have a figure of 10,000 acre-feet, which is the amount of water which would waste past Ysidora into the ocean if we went through a series of years such as we have had since 1924 and up to 1947, with Camp Pendleton developed up to its present demand on the river, that is, its demand on the river as of 1952.

Now, that is one answer. I don't know whether that is the right answer or not, because there is a question whether Fallbrook reservoir could divert all the water. I am not trying to solve or make an answer to that, but I am trying to present this.

Let us assume Camp Pendleton has a right to all the water it has heretofore diverted, and that this went back through the 24 years, and then the amount of water which would come down there and be available and pass Ysidora, if nothing else was done, would be 11,600 acre-feet average annual, instead of 9,600, or about 2,000 acre-feet more.

The Court: Is this a good stopping point?

The Witness: All right. I am tired, too.

The Court: We will take a short recess.

(Short recess.)

The Court: All right.

The Witness: When we recessed, I was talking about [947] Defendants' Exhibit 15, and I gave



(Testimony of Harold Conkling.)

the conclusions, and I might now explain some of those items.

In 1952 the net diversion from Camp Pendleton, that is, the total diversion minus the sewage which came back into the river, the river basins—this does not look right to me. Let me see what is the matter with it. Oh, yes. That is the 3,850 acre-feet, that is the total diversion, minus the sewage return, for 1952.

Now, lumping off the actual net diversion in 1943-47, of which we have records of diversions for the camp and the sewage return, we had 22,820 acre-feet. I have kept that together, because I want to divide it and get the average for the 24-year period.

Now, then, here is something: Assume during 1924-1942, 19 years, at a 2,000-acre-feet average—I assume that prior to purchase by the Government that about 2,000 acre-feet were consumed net in Camp Pendleton. I am not sure of that figure at all. I do know that in the '30s they developed, I believe, one of the orchards on the mesa, and I do know that they had some development over to the south. I have forgotten what you call the mesa, but it is toward Oceanside from the river. So I thought that was a fair figure, being approximately half of the net use as of the present time.

I think there is testimony and data to the effect that [948] the diversion was 8,000 acre-feet, which was given in the Santa Margarita—what is the

(Testimony of Harold Conkling.)

name of the case—Santa Margarita vs. the Vail Ranch?

The Court: Vail against Santa Margarita.

The Witness: Well, it was the lower people that brought the suit against the Santa Margarita. Anyway, there is some testimony in there, or some statement, that there was 8,000 acre-feet. I don't know how true that was, but I took, or I thought that was a reasonable figure here, and I can't find any data on it. I could have taken the 8,000 acre-feet, but didn't. For the 24 years it is 2,530 acre-feet per year, as what was historically the case. That is the case during the period of record. But we are going to have, with the present—if this present situation had existed during the period of record, there would have been a diversion of 1,320 acre-feet more, and that subtracted from what should be, instead of 10,940 acre-feet, subtracted from 11,040 acre-feet, would have left 9,720 acre-feet average annual waste into the ocean, with Camp Pendleton constructed and using the water for about 50,000-odd, possibly 57,000—55,000 people in the camp. That was the net use, and if that had existed during that whole time, you would have 1,320 more acre-feet, and you would have 9,720 acre-feet wasting into the ocean. Not every year. That is the average.

Now, of course, the question is: Does that come in [949] in a way that is usable and capturable? Of course, it would be in the large years, pretty largely, although not entirely.

(Testimony of Harold Conkling.)

You have between—according to Exhibit 1, which I believe is a little too small, the estimate there, but I believe the estimate of 7,410 acre-feet originating below the Fallbrook reservoir and above the Ysidora gauging station, that 7,410 acre-feet may be a little too small, but that comes in the same erratic way, presumably, that the recorded discharges of Fallbrook, say, come, and then on top of that you have the waste past the Fallbrook reservoir, which will pretty largely come in the periods of high runoff, that is, the years of high runoff and the months of high runoff.

Well, I made a study of what could be done with that water. Assuming that you had and that there was available 40,000 acre-feet of capacity unwatered in the alluvial basins, including the O'Neill basin and the Chappo basin, there has been testimony to the effect that there is that much capacity in those basins which could be used for storage, then, if during this average period, if a reservoir of 60,000 acre-feet had been constructed at De Luz and the water had been released from that reservoir into the ground water after the floods, put underground, the yield during that period would have been about 5,000 acre-feet over and above the present yield, which is sufficient to take care of the present personnel on Camp Pendleton. In other words, the [950] present yield is sufficient to take care of the camp, the personnel and the lawns, and the hospital, the golf links, and every use of water that is made there, and, in addition, there could be 5,000

(Testimony of Harold Conkling.)

acre-feet more, with a normal size reservoir. [951]

The Court: A reservoir which isn't there yet.

The Witness: Is not there yet.

The Court: Which is proposed to be built.

The Witness: Proposed to be built, yes. And that is more than sufficient to take care of the additional personnel.

I made some estimates of the amount of water that is being used. I believe I did recite those in my testimony. I believe there was—now, I don't know whether I said anything about it or not but I shall.

In connection with Exhibit No. 4 in use of water per capita, I made or tried to make some estimates of the amount of water which was being used now per capita and my difficulty was to find the per capita. I mean I don't know how many people are actually drawing on that water from Santa Margarita River.

If the whole personnel of the camp is drawing on it they are using about 85 gallons per day per capita. If 70 per cent of them are drawing on it, and I think the average would be more than that, they are using about 112 gallons per day per capita.

You understand in a city the use there—Santa Ana which I take as the more nearly comparable in terms of climate involves parks and very large areas of lawns as compared to this camp.

My belief is they don't need for the additional personnel [952] anything more than 100 gallons per capita per day.



(Testimony of Harold Conkling.)

The Court: All right.

The Witness: That is just about the end of my string.

The Court: All right. Let us have Mr. Dennis ask further questions from here on. I gather that what you are doing is this, you are postulating the existence of a reservoir over a period of years that would help refill the underground.

The Witness: Yes.

The Court: So as to give you a natural surplus. You are not stating that there is a surplus at the present time.

The Witness: Not with the natural flow, no.

The Court: All right.

The Witness: No, sir, I am stating this, however. Maybe we had better——

The Court: My questions have been simple questions. If they were involved Mr. Dennis would have been on his feet.

The Witness: No, no, I am trying to paint the picture rightly. If they would get the same amount of water and it would be held back at Fallbrook and only the water which passed Fallbrook and came down went into the ocean.

The Court: But that is not so clear as your last answer. I will take the direct answer he gave to my question.

Q. (By Mr. Dennis): Mr. Conkling, I think in your studies that you just recited, you were assuming that during this [953] period of time that the Vail reservoir had been built and in operation dur-

(Testimony of Harold Conkling.)

ing that entire period of time, and that the reservoir at the Fallbrook site had been built and in operation during that period of time.

A. That is right.

Q. And assuming that those two reservoirs had been built and in operation and had stored all of the water which passed the site of the two dams, respective dams, there would still be sufficient water that the Navy could utilize and collect by means of a small dam of around 50,000 acre-feet at the DeLuz site to use to recharge the basins.

A. I said 60,000 but that is because there is quite a big run-off at the Fallbrook reservoir and there would also be quite a spill out of the Fallbrook reservoir.

Q. Now, I believe that during your testimony you used the initials "U.S.E.D." and I thought sometimes you said U.S.G.D. Will you tell us what you meant by that?

A. Well, that is because I didn't talk plainly if it sounded like "U.S.G.D." I used U.S.E.D. and that is the United States Engineers Department.

Q. And I believe in calling your attention to Exhibit 8 attached to your report——

The Court: It is understood, so there will be no confusion in the record, that whenever we refer to Exhibit 10 or 5 it is one of the exhibits—it is a subdivision of [954] Exhibit Y, Y-8 and Y-9 and so forth. Otherwise there might be confusion between that number and the numbering of the plaintiff's exhibits.

(Testimony of Harold Conkling.)

Perhaps we should do the way they do in the State of Oregon, at least in the Federal Courts of Oregon. They number all their exhibits numerically and they run them right through so you never know when the plaintiff begins or the defendant begins, because they all have a number.

If you testified in Judge Fee's court in Washington in that water case he had there you would find out that is the way he does it. But our custom here conforms to the state practice, so we number the plaintiff's exhibits by number and the defendant's exhibits we number by letter. All right.

Q. (By Mr. Dennis): Calling your attention to Defendants' Exhibit Y-8. The figures which appear in the respective columns, the columns under Nigger Canyon, Fallbrook Canyon and Ysidora, represents the number of acre-feet in hundreds which pass that gauging station at that time. For instance in February of 1922 there would have been one 1—— A. 170 feet—no, 1,700 feet.

Q. 1,700 feet? A. Yes.

Q. So that the figure 1 then would express one thousand and the figure with a decimal point in front of it would mean 700? [955]

A. I believe I should have set up there at the head instead of 100 acre-feet it should have been a unit is 1,000 acre-feet.

These are the records from the U. S. Geological Water Supply papers and are to the nearest 100 acre-feet for simplicity. At the time I made this I thought we would have to refer to these figures

(Testimony of Harold Conkling.)

and it was much more convenient to have them shortened up like that than to have the longer figures as given in the United States Geological Survey papers.

Q. And the figures which are reflected in Defendants' Exhibit Y-7, Y-8, Y-9 and Y-10 were all obtained from the U.S.G.S. Survey papers?

A. Yes.

Q. And taken from Plaintiff's Exhibit 14, I believe?

A. Yes, sir.

Q. And they represent the actual amount of water which pass the gauging stations without any allowance for divergence?

A. Yes, the actual values.

Q. And I believe that the figures which are reflected in Defendants' Exhibit Y-5 are figures which were obtained from Plaintiff's Exhibit 28?

A. I so stated. I went back and stated where those were taken from. [956]

The Court: Yes. He gave that. When he first testified as to the first four exhibits he didn't mention the source and then he went back and took up each of them and stated the source.

Q. (By Mr. Dennis): Now, in your testimony where you mentioned the Fallbrook dam you were referring to a dam which would be located at the approximate site which is known as the Fallbrook dam site or the Lippincott dam site?

A. Yes.

The Court: And as I gather it that location is



(Testimony of Harold Conkling.)

so indicated on the application of Fallbrook, isn't that true?

The Witness: That is true, but I might point out——

The Court: Is it yours, too?

Mr. Dennis: Yes, we have approximately the same points of diversion.

The Witness: I might also point out, too—I might point to Exhibit 1 and the Fallbrook dam site is at the lower end of subdivision 4.

The Court: This composite map you referred to.

The Witness: Yes, sir. If you will look at the lower end of division 4 you will see a triangle there just below the red mark. It is on the wrong side of the river. I got it wrong but here it is. It should be over here.

The Court: Near No. 6?

The Witness: Here it is right here. You can see this [957] mark.

The Court: Will you mark it on my copy?

The Witness: That should be out. There is the river. Now, that is the gauging station. Here is the Ysidora gauging station. Here is the Railroad Canyon gauging station. Here is the Murrieta gauging station and here is the Temecula gauging station.

The Court: All right.

Q. (By Mr. Dennis): I wonder if we could have the witness mark that on Defendants' Exhibit Y-1 also?

The Court: All right.

(Testimony of Harold Conkling.)

Mr. Dennis: I believe, your Honor, the court reporter has the exhibit at the present time.

The Court: You can do that later.

Q. (By Mr. Dennis): Now, Mr. Conkling, calling your attention to Defendants' Exhibit Y-15, if you had assumed that for the period of time when you have no record for Camp Pendleton diversions, the diversions had been 8,000 feet instead of 2,000 acre-feet per year, the amount of water which would have run into the Pacific Ocean as shown by the last figure of 9,620 acre-feet, would of necessity have been larger, would it not?

A. That is right, it would have been.

Mr. Dennis: That is all.

The Court: All right, cross examine. [958]

Mr. Shryock: Does that conclude the direct examination of this witness?

Mr. Dennis: That concludes the direct examination.

Mr. Shryock: If your Honor please, there are a number of questions which, of course, I think we might well ask Mr. Conkling at this time, but I believe your Honor will recognize that a very considerable amount of material has now been submitted to us and it is now after 4:00 o'clock and while I realize your Honor's desire to continue as expeditiously as possible, we most certainly would appreciate an opportunity to examine this material.

Mr. Dennis: We have no objection, your Honor.

The Court: I think we are moving very fast. Will you have another witness?

Mr. Dennis: No, I don't think I will have additional testimony, your Honor.

The Court: Is that all?

Mr. Dennis: I think I will be in position to close.

The Court: Is the State going to present any testimony?

Mr. Grover: No. I might say at this time——

The Court: One of your men delivered a speech down in San Diego and had it all fixed up where they had a big dam built there and had water coming from the second barrel and I thought you would have him here.

Mr. Grover: No, your Honor. [959]

The Court: What is his name?

Mr. Grover: I wasn't present at the time.

The Court: Kendall, wasn't it? It is one of your engineers, one of your men in the water department. I am not teasing. He made a speech in San Diego.

Mr. Grover: I am sure he did.

The Court: I happened to be there on the day the speech was reported and he had it all fixed up. The water was actually flowing. Well, all right, I have no objection, gentlemen. I have worked very hard since I have gotten back. I am working on an opinion at the same time I am listening to this, so I have no objection to continuing the case until tomorrow morning so as not to break into the continuity.

Mr. Dennis: I might have one or two questions. I would want to ask Col. Robertson one or two questions after we are finished with this and I might have an exhibit or two.

The Court: That is all right. I am not binding you gentlemen. I just want to have an idea of the time is all.

Mr. Grover: Your Honor, there is one factual point I might bring up. The State is interested, as you will recall at the pretrial hearing, it was mentioned we would investigate our proprietary interest in the watershed and we find we do own some property up there. We are a teacup user it turns out. I have made arrangements with the representatives of the Government to settle that amicably by mutual investigation [960] and unless we are mistaken in what the results of that will be, there will be no reason to litigate that.

The Court: That is all right.

Mr. Shryock: We quite agree.

The Court: If you want to handle it by stipulation you may do so. I am not crowding you gentlemen. I will give you ample opportunity to conclude your case.

I think the Court of Appeals is going to be shocked when they hear that while they are still debating whether I have a right to move the case, we have tried one phase of it after all.

Mr. Shryock: Thank you, sir.

The Court: Tomorrow morning at 10:00 o'clock.

(Whereupon, at 4:15 o'clock p.m. a recess was had until 10:00 o'clock a.m. Thursday, November 20, 1952.) [961]

November 20, 1952; 10:00 o'clock a.m.

The Court: Cause on trial.

Mr. Shryock: Mr. Conkling.



HAROLD CONKLING

resumed the stand as a witness for the defendants and, having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

Mr. Dennis: If your Honor please, in going over the record last evening, I found there were a couple of obvious errors which I think should be corrected.

On page 933, at line 10, it reads, "the period 1924 to 1927." That should be "1924 to 1947."

The Court: All right.

Mr. Dennis: On page 936, at line 24, the witness stated, "It turned out to be 137 gallons per unit of population." The transcript reads "137,000 gallons per unit of population."

I believe that we can agree that those corrections should be made, Commander?

Mr. Shryock: We can.

Mr. Dennis: And, if your Honor please, there are also two answers by the witness that I think should be explained, and I would like the opportunity of asking him to explain one or two of the answers which were previously made, prior [964] to his cross examination.

The Court: All right.

Mr. Dennis: Is there any objection, Commander?

Mr. Shryock: No.

Q. (By Mr. Dennis): On page 939, you say, "This is the graphical expression of Plaintiff's Exhibit 8."

I believe at that time you were holding the bar graph which is Defendants' Y-9; is that correct?

(Testimony of Harold Conkling.)

A. Exhibit Y-9 is the graphic presentation of the figures on Exhibit 8, Exhibit Y-8.

Q. And that was your Exhibit Y-8?

A. Yes.

Q. I believe yesterday, Mr. Conkling, in response to the Court's question:

"The Court: So as to give you a natural surplus. You are not stating that there is a surplus at the present time.

"The Witness: Not with the natural flow, no.

"The Court: All right.

"The Witness: No, sir, I am stating this, however. Maybe we had better——

"The Court: My questions have been simple questions. If they were involved Mr. Dennis would have been on his feet. [965]

"The Witness: No, no, I am trying to paint the picture rightly. If they would get the same amount of water and it would be held back at Fallbrook and only the water which passed Fallbrook and came down went into the ocean."

Do you desire to make any explanation or clarify the answer which you made to the Court's question?

A. Well, I guess I had better start back of that, in order to make it plain what I meant.

There is a large surplus of water in the Santa Margarita available for appropriation, and it has been filed on.

Let me go back a little further. The historical record shows a discharge at Ysidora, which is water wasted in the ocean, and which was available for

(Testimony of Harold Conkling.)

appropriation during those years of the records. That discharge will be decreased somewhat by the agreement between the Vail interests and the Santa Margarita interests, which is in effect now.

After that the Vail reservoir was in operation, and there will still be a large surplus of water wasted at Ysidora, which would not sink into the underground reservoir but which would just waste, regardless of some other items. And I did not mean to say in my answer that that water was not available now. It is available now. A large surplus is available for appropriation by the first comer, and I think I meant, by what you read to me there, that if the Fallbrook [966] reservoir were built and were available, and if the Vail reservoir were built and in operation, there still would be enough water coming by the—available to Camp Pendleton, to take care of its present requirements, which consists of the irrigated area, and to take care of the camp as it was in 1951-1952, when there was a population of 55,000, approximately, in the camp, and to take care of another 50,000 population, if reservoirs were built by the camp, as they will have to be, anyway.

Does that clear it up for you, Mr. Dennis? [967]

Q. I think so. Now, what is your—you have used the term “cyclic storage” and “seasonal storage” and I wonder if you would tell us what you mean by those terms?

A. Well, cyclic storage means storing water in

(Testimony of Harold Conkling.)

one year of surplus and carrying it through for the succeeding years of drought.

Seasonal storage means not exactly what it says. It means if you take—you think that means that it would be stored in the winter and released in the summer. It does that but it means more than that. It means that you would store water from a flood at the first of the month which went into the ocean and you used it the last of that same month or some short period like that, it would still be out of season—out of time. In other words—and that is the seasonal storage.

Any storage—any storage of water which goes into the ocean to be used later, even a very short time later, is seasonal storage.

Q. Could you tell us what is meant by the phrase “temporary storage?”

A. Temporary storage relates only to water which could be used directly, but which for the convenience of the individual concerned may be stored overnight, over the week or some short time so there will be a larger head of water to be used on what properties the individual or entity desires [968] to use it.

In other words, it has to be water which could be used but which was stored instead of being used. It does not relate to waters which wasted into the ocean if not used.

Mr. Dennis: That is all.

A. Just one additional thought. The main differentiation between “temporary storage” and



(Testimony of Harold Conkling.)

“seasonal storage” is whether the water which was stored could have been used or could not have been used at the time it flowed.

Mr. Dennis: That is all.

### Cross Examination

Q. (By Mr. Shryock): Now, Mr. Conkling, after you had made that somewhat elaborate explanation of what you meant in response to the inquiry about the question which seemed to puzzle Mr. Dennis, you said, “I think that what I meant is——.” Now, that was a most cautious statement.

A. I didn’t have the transcript before me.

Q. I see. You are prepared to say that is what you meant then, is it?

A. Well, we will call it that, yes.

Q. Now, Mr. Conkling, I believe that I understand in my limited way what Exhibit Y and its 15 sub-exhibits proposes to demonstrate, although I do have a few questions as to some of the sub-exhibits. But first may I ask, does Exhibit Y, [969] if we look at it as a whole, in a sense propose the physical solution to which Mr. Dennis has referred? Is that your concept of it?

A. I don’t know—I don’t know what your water rights are. I have made it on two bases. If you will look at Exhibit Y-15, the one which in effect says “You have no water rights at all,” and so the upper entities—“You have no water rights at all for the water the way you are using it.” You do have riparian rights. And the upper entities can do

(Testimony of Harold Conkling.)

what they want to with the water and then even if all of the water was taken, as I said in my statement, by the two upper entities there would still be enough water coming down to Camp Pendleton to take care of the situation which I outlined in my previous answer.

Now, just to be clear and try to find out what would be the situation if you had the water rights—I mean the water which historically may have flowed into the ocean, but which appeared would sink underground now and be available to your purposes, I came up with the note on the bottom of Exhibit Y-15 which states what would happen under those cases.

Now, there is—between those two there is the physical solution.

I might say now while we are on the subject that I went, as you notice I stated in Exhibit 15—by the way, is there any question as to how Exhibit Y-15 was made up and the bookkeeping [970] attached to it? I would like to clear that up right now if there is.

Q. Well, suppose we come to that, Mr. Conkling, because I must confess I have a great deal of difficulty with Exhibit 15.

A. Let me go ahead with it then. The actual recorded discharge at Ysidora during the average period 1924-1947, the average annual flow there was 31,920 acre-feet. Now, what would it have been if there had not been water used in what is now Camp Pendleton or the ranch prior to the ownership by

(Testimony of Harold Conkling.)

the Government during that period of 24 years? Coming down to the fourth item and the sub-items under that it would have been increased if there had been no diversion by the amount of the diversion and we do know the diversion between 1943 and 1947 because we have a record of it.

I am speaking about the net diversion which was 22,820 acre-feet for those five years, but we do not know what the diversion was between 1924 and 1942 and I put that down at 2,000 acre-feet, but I would like to say—maybe I had better change it had I known this before. I will look into what bulletin No. 1 of the State says about the flows, the natural flows of the stream and I find out that at Ysidora during this period, 1924 to 1947, they say that the natural flow during that period at Ysidora was—would have been had there been no diversion at all, would have been 36,450 acre-feet [971] on the average, and of that increase over and above, or that difference that means a depletion, an average depletion of 9,160 acre-feet of which 1,786 acre-feet occurred from Fallbrook and above which left 7,400 acre-feet as the average depletion in the area below Fallbrook in that 24 year period. In other words, there were 7,400 acre-feet net according to the State being diverted during 1924-1947 period.

I did not use that figure but had I used that figure I would have substituted—I will come to that in just a moment, would have substituted another figure for the one we have in here, but going back now to the figures as I have them in this Exhibit

(Testimony of Harold Conkling.)

Y-15, I found that the average depletion with that assumption of 2,000 acre-feet, the average depletion, average net diversion from the basins was 2,530 acre-feet. If that had not been present we should have added that to 31,920 acre-feet and we would have had 34,450 acre-feet as the figure up there.

Now, subtract the amount of water diverted by the Vail reservoir and the amount diverted by the Fallbrook reservoir from that and we have a figure of——

Q. You simply carry it down?

A. Yes, just the bookkeeping arrangement. Is that clear all the way through now?

Q. I am afraid I cannot say that it is. In fact I think I am now a little more confused than I was when we [972] started. First of all, where did you get this 36,000 average figure that you speak of?

A. That is the state's estimate of what the flow would have been had there been no diversion in there.

Q. That is not the U.S.G.S. record?

A. That is not the G.S. record. This is the G.S. record that I spoke about.

Q. Well, do you feel now then that the figure 31,920 as an average for that period is not an accurate one?

A. Oh, no, that is right. That is right. It wouldn't have changed that figure—well, it seems to me it is just like—just like any bookkeeping proposition. We had 31,920 acre-feet out there which was measured. Now the State says if there had not been any



(Testimony of Harold Conkling.)

diversions from that, why, about 7,400 acre-feet per year more would have gone out there.

Q. If there had been no diversion?

A. If there had been no diversion. Now, the reason I brought that up at this particular time was that if I had used the State's figure here we would have come out with about an average of 13,000 acre-feet as available to the camp in addition to what they have been taking—to what they were taking in 1952. In other words, we would have had about 20,000 acre-feet available to the camp.

I did not use that figure but I have used a much more conservative figure, but this is presumably—presumably [973] the State has put more time on it than I have and maybe they are right. I am not saying they are wrong. I am just saying I didn't use it.

Q. So that the picture this morning looks more optimistic for us than it did yesterday?

A. If you use the State's figures, yes, but if you don't use the State's figures you are—we will stick to the figure that I have in here because that is enough.

Q. Well, then, again I say, Mr. Conkling, do you not concede that the general effect of Exhibit Y and its 15 sub-exhibits is to present what we might call a physical solution of the water problem existing on this stream?

A. That is right.

Q. And yesterday at page 940 when you were referring to this very splendid graph, which is Exhibit Y-9, and I mean that with the utmost sincerity.

(Testimony of Harold Conkling.)

I think it is simply a splendid representation of the facts applicable to this particular valley. You stated: "What I want to point out there," referring to this graph, "and which this shows instantly if you are trying to get very much yield out of the Santa Margarita River, you have to build a reservoir and a pretty large reservoir and that the capacity of the reservoir must be several times the safe yield you will get out [974] of the reservoir. In other words, if you will take the period 1927 to 1932 you will see that you would have to lop off and hold over quite a lot of that 91,200 acre-feet."

Now, doesn't that rather fairly represent your general approach to your study of this stream, Mr. Conkling?      A. That is true.

Q. Namely, that you cannot make a rational solution of whatever problem that may exist without taking into consideration control structures?

A. That is right.

Q. Adverting to Exhibit Y-2, and this I might say is a relatively minor point, you have explained that as sewage of Camp Pendleton which returns to Santa Margarita River underground basins, direct or via Lake O'Neill, and as you explained, you obtained that information from Plaintiff's Exhibit 22?      A. That is correct.

Q. And I don't dispute for one moment that you did and very accurately reproduced it.

A. Except for the estimated amount.

Q. Yes, I understand that. Therefore, as I understand it, you propose to help in the general over-

(Testimony of Harold Conkling.)

all picture by showing the water returned into the basin from the sewage disposal plant? [975]

A. That is correct.

Q. Would it surprise you to know that only one of those plants has been returning the volume of effluent ascribed to it since the camp was placed in operation by the Government; that plant No. 2—perhaps my numbers of plants may be wrong, has been returning it to the basin only since two or three years ago and that the third plant has been returning it only for the past few months?

A. Well, then, we would have to correct the average figure. [976]

Q. I simply call it to your attention——

A. Yes, thank you very much.

Q. ——so that we may not be misled by having Exhibit 2 represent to us that all of these figures show water which has historically here been returned into the basin by the sewage effluent.

A. That would be a final correction on Y-15.

Mr. Shryock: Yes, sir.

Mr. Dennis: Am I mistaken in this, that Mr. McNearny I think testified that all of the lines for sewage effluent and water distribution lines have been the same ever since they first took charge of the camp?

Mr. Shryock: I think you are mistaken by using the term "sewage effluent system." He said the water-distribution systems have been the same since the camp was established in 1942-43.

Mr. Dennis: I asked as to the sewage effluent

(Testimony of Harold Conkling.)

discharges, and nobody volunteered the information that it was different now than in the past.

Mr. Shryock: May I make it plain that I am not criticizing Mr. Conkling, because he took the figures from our Exhibit 22, and they did not indicate when the return began.

Mr. Dennis: I think this is the first time that there has been information given that these plants 2 and 3 have not discharged into the Santa Margarita basin. [977]

Mr. Shryock: That may be.

Q. (By Mr. Shryock): Now, Mr. Conkling, I now place before you your graph Y-9, and I believe that that is a graphic explanation of your Exhibit Y-8, is it not? A. That is correct.

Q. And that, in turn, with the exception of the fact that there was a mistake in the statement that the unit is 100 acre-feet, and I believe you corrected that to mean 1,000 acre-feet—— A. Yes.

Q. ——that purports to show the monthly and annual discharges at four of the stream-gauging stations? A. That is Exhibit——

Q. That is Exhibit 8 in the copy furnished to us.

A. No, no, I don't believe so. Exhibit 8—Exhibit 9—oh, yes, Exhibit 8, that is right. You are correct. I am sorry.

Mr. Dennis: I wonder if you would read that question back to the witness.

(The record was read.)

Mr. Dennis: You are referring to Exhibit Y-8, and not Y-9?



(Testimony of Harold Conkling.)

Mr. Shryock: No, I am referring exactly to Y-9, that Y-9 explains Y-8.

Mr. Dennis: Do you mean to say that shows a monthly [978] average, that Y-9 shows a monthly or an annual average?

Mr. Shryock: I don't mean to say that it shows anything but what it purports to show, but I simply say that I believe Mr. Conkling stated it was a graphic representation of Y-8.

Mr. Dennis: All right. Fine.

The Witness: Did I say it was a—it was a graphic representation of Y-7. Let's put it back there, which is the annuals, and that should be corrected in my statement of this morning, too.

Q. (By Mr. Shryock): Well, Y-8, then, is a breakdown of Y-7, is it?

A. Yes, it is a monthly itemization of the quantities that went into Y-7.

Q. Now, on Y-9, there you have computed what you call an average line, have you not?

A. Yes.

Q. And that appears on the graph alongside of your representation of the Ysidora gauging station, does it not?

A. Yes.

Q. Now, what is the figure of that average?

A. 28,900.

Q. And that is for the period 1923-24 to 1952, through the water year 1952?

A. No, sir. 1924-25 through the water year 1951-52.

Q. And, therefore, that represents, for the great

(Testimony of Harold Conkling.)

bulk [979] of the period, a time when there was no control structure at all on the stream, does it not?

A. Yes, it does.

Q. Mr. Conkling, in your profession is what is called an average of an uncontrolled stream in what might be called a flash-flood area considered a reliable figure in estimating the stream's yield?

A. Well, you use an average to get a picture, and a comparative picture. Now, you can build enough capacity, storage capacity, to make the average.

Q. You are coming back to a reservoir, and I am asking the question——

A. Oh, yes, if you are making a survey of a stream system, such as we are doing here, to try to get a picture of the relation between runoffs by taking an average period as the best period to work with.

Q. Well, are you now telling me you water engineers consider that an average is one of the most desirable criteria to determine what a stream yields?

A. It is the first one I use. I am not sure about other water engineers. I use it as the best criterion to use.

Q. Well, you are——

A. I am a water engineer.

Q. Yes, sir. How many times does your graph there show the runoff at Ysidora in that period of some 27 years—show [980] that it rises above the average line?

A. Seven times.

Q. Now, do you have your Exhibit Y before you?

(Testimony of Harold Conkling.)

A. Yes, I have.

Q. Now, turning to your Exhibit Y-10, there you purport to show the number of months in which, out of a period of 26, 27, or 28 years, there was a runoff at Ysidora; is that not correct?

A. Yes, sir.

Q. And that is merely what you might call a frequency chart, isn't it?

A. That is right. It is a condensation of all the data in Exhibit Y-8. It is intended to convey some picture of what Y-8 showed.

Q. And as to that exhibit, I believe that you yourself said, at page 942, "Now, that of course might give a false impression because actually the amount of water that flows into the ocean in some of those months is very small, so you will have to turn over to Exhibit 11."

A. That is correct.

Q. And I am quoting that merely to emphasize the fact that you yourself explained that it might be deceptive, and that we would have to look at Exhibit 11.

A. Yes.

Q. Now, Exhibit 11 purports to show the discharge in [981] acre-feet at the Ysidora gauging station based on peak months, does it not?

A. No, it is the average for each one of the months.

Q. Well, over what period?

A. Over the—well, over the same period. It doesn't say here, does it? Oh, yes, it does. It says "Average of Recorded Discharges by Months."

(Testimony of Harold Conkling.)

That means for the period covered by Exhibit 10.

Q. Which would, therefore, be for this 27-year period that we are speaking of?

A. That is right.

Q. And there we see that the peak month is March, of some 10,000 acre-feet, and almost as high is February, and then the other two months are January and April——

A. That is correct.

Q. ——for rather a substantial runoff?

A. Yes.

Q. Even in those cases, Mr. Conkling, isn't it true that there might be a runoff of only 500 acre-feet in one March—in a month of March—and perhaps 50,000 in another month of March?

A. There might be. I don't know. Yes, I think that is true.

Q. To that extent, it might be deceptive, in the sense that we cannot say that March is always going to give us [982] 10,000 acre-feet?

A. Oh, I don't think it was ever my intention of saying that. We all know that all of the streams in San Diego County and all of the streams in California and all of the streams in the West, and all the streams in Southern California particularly, have very erratic flows, that you have to hold water over from the surplus years to the other years.

I don't know why you bear down on this. It is known. It is a fact. All San Diego streams are developed many, many times by reservoirs much greater than the average flow. The Vail reservoir



(Testimony of Harold Conkling.)

has a capacity of seven times the yield, and five times the average flow.

Q. Which is the point, when you said——

A. That is a point we have to make. The point is this about this whole situation here, that you have to have reservoirs, and you don't have a right to the water—you don't have the right to water, under riparian rights, that just merely goes by there. You have to get it under an appropriative right. That is the point to the whole exhibit.

Q. Now, without reservoirs——

A. Without reservoirs you can't do anything, and you have to build reservoirs under an appropriative right, and perhaps you have to get the capacity which you create underground under an appropriative right to store water underground. Probably, you do have. In fact, the State insists [983] that if you are going to store water underground, you do it by appropriation, and you name the capacity of your reservoir underground. In other words, to store that water underground, which you are now doing, you may have to have an appropriation for it. At least, that is the rule that the States makes in the administration of the water law, which I did for 24 years.

Q. Then, again, I say that you have about concluded that there is no solution for whatever water problems exist on this stream, except by reservoirs?

A. Of course not. There is no solution for the development of any stream in California except by reservoirs, for full development.

(Testimony of Harold Conkling.)

The Court: The answer to the question, then, is "Yes."

The Witness: Yes.

The Court: All right.

The Witness: Well, didn't I say, "Of course not"?

Q. (By Mr. Shryock): Mr. Conkling, when did you——

The Court: You know, in French—and Commander Shryock knows French—they have an expression which does away with the possibility of an answer being misunderstood. They say, "Mais oui." It means, "But on the contrary," and there is no equivalent in English for it. Is there?

Mr. Shryock: Not that I know of.

The Court: That is "mais oui," "but yes." And it prevents an answer which sounds evasive, you see. [984]

The Witness: I didn't intend my answer to sound evasive because I didn't answer "Yes."

The Court: No, no. I am just pointing this out.

The Witness: Yes.

Q. (By Mr. Shryock): By way of illustration of what I was asking you about Exhibit Y-11, Mr. Conkling, will your figures show, for example, that in the year 1940-41, which was one of those 117,000-acre-feet runoff years—— A. Yes.

Q. ——how much ran off in the month of March, for example? A. '40-41? 53,600.

Q. That is a very substantial part of the 117,000? A. Oh, yes, yes.

(Testimony of Harold Conkling.)

Q. Now, Mr. Conkling, have you visited the Santa Margarita Valley above Nigger Canyon?

A. Yes. Oh, above? No, I haven't. Not recently, at least.

Q. Did you take into account any use of water in the lands above the Vails in making your general over-all approach to this study?

A. This is a record which I have used. I have used the recorded discharges which give effect to all depletions above Ysidora.

Q. Above Ysidora? [985]

A. Above Ysidora.

Q. Then you mean to say that you feel that you have taken into account riparian usage above the Vail lands?

A. Yes, substantially. There may have been some increase in the use since 1947, which is not taken into account. However, the nearest information—the best information I can get as to that is that any such increase is very small, and it wouldn't affect the general conclusion.

Q. Are you aware of the fact that the Vails have taken as high as 7,000 acre-feet of riparian water, historically?

A. I have their record in there some place.

Q. If they have a riparian right to that water, they still would be entitled to use that water, even though recent usage might be way below that figure, would they not?

A. Well, they have so much water there, and they are practically going to control the flow at

(Testimony of Harold Conkling.)

Nigger Canyon with the reservoir they have built, and whether it is used under riparian rights or whether it is used under appropriative right, it makes very little difference—no difference, so far as I can see. They are using it. They are using the water. What we are after is the depletion of the stream, as of the way they propose to manipulate the reservoir, plus 1,000 acre-feet bonus, which I threw in below the reservoir. And I said—I stated that I didn't think they could use that water, because it is just too much trouble to do it, and [986] because they didn't build an underground reservoir, which is not under control, and several other things.

So I think that the difficulty of using that water will be so much that they will not use it all.

Q. Mr. Conkling, you visited Camp Pendleton yourself, did you not?      A. Yes, I did.

Q. That was on the 24th of October, do you recall?

A. I don't remember the date, but I did, recently.

Q. That was your only visit to the camp, was it not?      A. That is correct.

Q. Incidentally, was the degree of access given to you satisfactory?

A. Oh, very pleasant. I had a very nice day. I enjoyed it very much, and I got around and saw everything but the golf course, I believe.

Q. And you weren't blindfolded?

A. No, I wasn't blindfolded when I went in.



(Testimony of Harold Conkling.)

Q. Now, Mr. Conkling, in working out this so-called physical solution, this matter that involves reservoirs, and you referred quite frequently in your testimony, I believe, to the Fallbrook reservoir and on occasion to the Santa Margarita Mutual reservoir and to the DeLuz reservoir but generally speaking you seemed to contemplate a 50,000, 60,000 or 70,000 acre-foot reservoir or reservoirs in addition to the Vail and those two generally were what you had in mind?

A. That is correct.

Q. As controlling the stream, isn't that correct?

A. The 70,000—I was talking about a 70,000 acre-foot reservoir at Fallbrook because the Santa Margarita Mutual Water Company has filed a 60,000 acre-foot storage capacity there and the Fallbrook Utility District has filed a 10,000 acre-feet.

Q. Yes, so you combined the two.

A. I combined the two and made it 70,000. Whether that is the best site for a reservoir I don't know. The canyon would have to be examined as to whether a better site could be found.

Q. Yes. Now, when you were describing your work with the state and describing your approach to the various water problems which came before you, you stated at page 981:

“But after I got into the investigational work it was found necessary to take entire stream [988] systems before you could conveniently and economically lay out a project.”

A. That was said with reference to my work

(Testimony of Harold Conkling.)

with the U. S. Reclamation Bureau and not with the State.

Q. I see. Has that in general been your approach to problems of this kind, that you have considered whether or not the solution would be an economical one? A. Oh, yes.

Q. Did you take into consideration the height of a dam that would be required to impound 70,000 acre-feet, Mr. Conkling?

A. I made the filings for the Santa Margarita Mutual Water Company and we filed on a reservoir which showed the height of the dam. I believe you have to show a cross section, a profile of the dam site, so we had a knowledge of the height of the dam, yes.

Q. Is there a State limit on height for dams of that character? A. No, none that I know of.

Q. Mr. Conkling, did you prepare the application to the State of California on behalf of the Santa Margarita Mutual Water Company?

A. It was done in my office. I didn't do it personally. I was not in and around when it was done.

Q. Excuse me. I hadn't quite finished. Not for the [989] dam but for the 60 cubic feet per second of diversion?

A. No. That was done from my office. As I say, I was not there at that time.

Q. Was it your recommendation as to the amount of the diversion?

A. No, but I will tell you how you do make such a diversion or how you would make such a

(Testimony of Harold Conkling.)

request. To get the water from the river up to the place of use required a pipeline of about 60 second-foot capacity. Now it might be that there would be 60 second-feet of water come down the river which could be diverted during the irrigation season and if so you would want to divert it into that pipeline of your 60 second-foot capacity. Therefore in justice to your clients you should put in a 60-second-foot direct diversion. It may be entirely meaningless but you do not want to foreclose them from diverting 60 second-feet when it was there to divert during the irrigation season if they had an opportunity to do so without drawing on storage.

Q. Meaningless except that if it were translated into acre-feet per year and were in fact taken it would be some 43,000 odd acre-feet, would it not?

A. Oh, yes, but that is utterly meaningless. It probably would be more than that but that is utterly meaningless because we know it isn't there and may never be there and probably—I think very probably will never be there [990] except in very small quantity and maybe they never could divert that because they didn't have a right to it. So, that is just an upper figure that you put on. You don't want to foreclose your clients just because of ignorance on your part.

Q. You say it may never be there?

A. Not as a direct flow when they want it. I don't know whether it will or not. If it is there, they are just lucky that they had somebody who knew how to file.

(Testimony of Harold Conkling.)

Q. I am sure they had a very able adviser.

Mr. Shryock: No further questions.

Mr. Dennis: No questions.

Mr. Shryock: Thank you very much, Mr. Conkling.

The Court: All right, Mr. Conkling.

The Witness: All done?

The Court: Yes, surprise. This is off the record.

(Discussion off the record.)

The Court: All right, Mr. Dennis.

Mr. Dennis: If your Honor please, at this time I want to put in evidence as Defendants' next in order table No. 16 which was filed in answer to the Santa Margarita Mutual Water Company demand for written interrogatories, which is the table showing the safe yield of the basins in the Pendleton area.

Mr. Shryock: No objection.

The Court: It will be received. [991]

The Clerk: Defendants' Exhibit Z in evidence.

(The document referred to was marked Defendants' Exhibit Z and received in evidence.)

Mr. Dennis: Now at this time I would like to offer in evidence Plaintiff's pretrial Exhibits 32, 23, 24 and 25.

Mr. Shryock: You would like to offer them in evidence?

Mr. Dennis: Yes. I believe that the exhibits which were actually offered in evidence do not agree with the pretrial exhibits in some particulars,



mainly—particularly in the reduction of size, reduction of markings which were on them, coloration—various areas which were colored and I would like to have the pretrial exhibits which were actually served on the defendants and filed with the court introduced in evidence at this time.

Mr. Shryock: Well, just so that we understand. Are you referring to the pretrial exhibits as to which we requested permission to withdraw them from the clerk and submit the ones that were actually handed out at the time they were offered?

Mr. Dennis: That is right.

Mr. Shryock: At which time, of course, we represented as to what we were handing up was exactly the same as what was being withdrawn.

Are you now saying that what you are offering is different from what was handed in?

Mr. Dennis: They are different from the ones which were [992] handed to me.

Mr. Shryock: Why not let us compare what you now propose to offer with what is in evidence and let us see if they are different.

Mr. Dennis: Well, for instance, let us take Plaintiff's Exhibit 8 which looks slightly different from the one which was handed to me in that many of the areas are colored, the size of the exhibit is different.

Mr. Shryock: Well now, may I say this, that in many cases we prepared these large exhibits and with the full knowledge and consent of the defendants submitted them smaller and more easily handled copies ahead of the trial.

Obviously when the time came to the trial of the case itself we handed up the originals as the best evidence that could be handed to the court.

The Court: I cannot see that the matter is worth arguing. If counsel feels that there is a variation he can offer them as his own exhibit and then at the argument he may point out or you may point out, that there is no difference, that it is merely because the size is different.

Mr. Dennis: My reason for that, your Honor——

The Court: I always take the view that we are dealing with physical exhibits and a question of reducing the size through photography may result in a variance and then there is no harm in having both in. [993]

Mr. Dennis: My only position is this, your Honor, that some of these exhibits have been reduced in size to such a degree it was an impossibility to determine what was depicted upon the exhibit.

Now it is my understanding also that only those features on the various exhibits which have been called to the attention of the court by plaintiff are to be considered in evidence. I just don't want to be in this position, that I am bound by certain facts depicted on the exhibits, full-size exhibits which went into evidence and which we with due diligence could not discover on the copies handed to us. I don't want to make an issue of it.

The Court: So far as the exhibits are concerned, gentlemen, all the exhibits are in the record. Those that are in the form of maps, of course, cannot be

translated into words. Therefore, the entire exhibit is before the court for such emphasis as counsel desires to make.

As to exhibits which consist of writing, they are transcribed into the record that is prepared and in the interest of economy of time we do not stop to read them because I read them myself before I decide the case.

I have read a lot of them as we go along and will probably read more before the case is submitted. So in the last analysis if there is a variance between two exhibits due to size the best way is to introduce both of them. [994]

Mr. Shryock: And may I say, your Honor, that I have no objection whatever to Mr. Dennis introducing as his exhibits certain documents regarding which he will say:

“This is what I received as Plaintiff’s Exhibit so and so” and “This is what I did my work from.”

The Court: Here is one other thought so far as the question of proof is concerned.

The exchange of exhibits is a very salutary method in trials of this character. All students of procedure have recommended it.

The committee which is known as the Prettyman Committee, of which I was a member, dealt with proof in protracted cases—chiefly antitrust cases and emphasized that fact and in the lecture I gave at the request of Judge Prettyman and Murray before the American Bar Association committee on judicial administration, and which you will find in the next issue of Federal Rules Decisions, I

emphasized that fact. But the exchange of exhibits does not bind the person who offers an exhibit or preclude him at the time of trial from offering a modification of an exhibit or exhibits. And unless the other party has been misled he is entitled to the version that he introduces at the trial at the same time for whatever argument it may be worth.

The other one may be put in to see if there is any variation. [995]

I don't want to close the testimony in this case and then have an argument made that would prevent one side or the other from giving full scope to what is in the record regardless of the form in which a particular exhibit may have been presented for convenience sake before trial.

Mr. Shryock: As I say, I have no objection to his offering them, sir, but I do resent the implication that we have attempted to mislead the defendant.

The Court: No, no, no.

Mr. Shryock: By submitting something less than the original.

The Court: He did not use the word mislead. I used that word.

Mr. Dennis: Commander, I haven't implied that.

The Court: Unless there is a prejudice which results to the other side they have a right to introduce the form which is more desirable in the trial of the cause.

Mr. Shryock: And I might say, your Honor, that Mr. Dennis has been in the office of Ground Water Resources 20 times. Furthermore we took



everyone of these original exhibits which we have offered as this case has progressed and have had them in our office in San Diego and sent formal notices to counsel saying: "You may come over and examine them."

The Court: Yes.

Mr. Shryock: And I simply say that I feel it is unfair [996] after we practically prepared his case for him to say that we have misled him.

The Court: All right.

Mr. Dennis: I haven't tried to imply that.

The Court: In using the word "prejudice" I meant results in prejudice, prejudice to the parties and that is not indicated here.

I am not going to re-open the case for the purpose of introducing new maps. If by reason of the map counsel was prevented from presenting some additional testimony now is the time to say so.

Mr. Dennis: The only thing I have in mind, your Honor, is I want to protect my client in this matter. We used the maps, necessarily had to in view of the fact that our expert was in Los Angeles and I live in Fallbrook, we had to use the maps which were presented as our working papers. As your Honor will recall I said that to a large extent the defendants were going to have to rely on the evidence which was going to be introduced by the plaintiff.

Now, because of the small size of their maps there may have been things on them which were impossible for us to see.

The Court: Mr. Conkling has a good imagination.

Mr. Dennis: If your Honor please, yesterday it was agreed that Mr. Hall would furnish us with the second page of the map which we introduced into evidence yesterday, which [997] we obtained from the Division of Water Resources. This morning he told me that because of the character of the map that he has in his possession it is only possible to make a photostatic copy of it and I would suggest this, that with plaintiff's consent the tracing, the original tracing is in Sacramento, that we have the Office of Ground Water Resources make a copy of that tracing and send it to the clerk and when it is received it will be entered in evidence.

The Court: Let us give it a number now.

Mr. Dennis: That will be part of Defendants' Exhibit —

Mr. Shryock: Did you say "Office of Ground Water Resources"?

Mr. Dennis: Division of Water Resources.

Mr. Shryock: At whose expense?

Mr. Dennis: We will pay the expense, naturally. We could either give that a number or it could be attached to the map which is already in evidence and of which it is a part—

Mr. Shryock: No objection.

The Court: What exhibit number is it?

Mr. Dennis: Defendants' Exhibit F.

The Court: All right.

(The document referred to was received in evidence and made a part of Defendants' Exhibit F.)

Mr. Dennis: Now, I believe yesterday in putting in the application of the Santa Margarita Mutual Water Company and [998] the United States Navy we didn't agree as to the dates they were received. They bear a notation, the date of which they were filed with the Division of Water Resources, but I think we can have a stipulation they were filed on the date they were received.

Mr. Shryock: I think the court indicated that yesterday.

Mr. Dennis: That was on one of the protests, I think.

The Court: All right.

Mr. Dennis: I would like to recall Col. Robertson for just two questions.

The Court: All right.

### ELIOTT ROBERTSON

having been previously sworn, resumed the stand and testified further as follows:

#### Cross Examination

Q. (By Mr. Dennis): Col. Robertson, I believe it is possible for Camp Pendleton to secure water from the Metropolitan Water District by means of the San Diego aqueduct, is it not?

Mr. Shryock: If you feel qualified to answer these questions you may.

The Witness: I have never had any negotiations

(Testimony of Elliott Robertson.)

with the Metropolitan Water District. However, I have followed closely, by correspondence and direct consultation with folks who have in our behalf. We have never been able to have the [999] Metropolitan Water District offer us a firm supply of water.

Q. (By Mr. Dennis): There are other marine installations in Southern California who are acquiring water from either the Metropolitan Water District or from the San Diego County Water Authority, is there not?

A. There is one Marine Corp installation which acquires water from the City of San Diego.

Q. Does not the El Toro Marine Base also obtain water there?

A. That base is under the management of the Bureau of Aeronautics of the Navy Department. I know of the arrangement there. It is not in a true sense a Marine Corps establishment in that we do not finance or manage it. We are not the owners and operators. [1000]

Q. Colonel,——

A. Their contract there, as I remember it, having seen it, is for an off-peak supply of water.

Q. Colonel, you know, do you not, there is a contract involving the Colorado River water, which makes available to military installations waters which may be diverted from the Colorado River, from the metropolitan districts, the metropolitan water districts?

A. Will you read that question?



(Testimony of Elliott Robertson.)

(The question was read.)

A. I do not.

Q. You are not familiar with such contract?

A. I am not familiar with any contract of that nature.

Mr. Dennis: That is all.

Mr. Shryock: Thank you, Colonel.

The Court: All right.

(Witness excused.)

Mr. Dennis: I think the defendant rests, your Honor.

The Court: All right.

Mr. Dennis: I might call your Honor's attention to this, before I rest, and that is that in the pre-trial order there were two applications which were referred to and which we included at the request of the plaintiff. The defendant Santa Margarita Mutual Water Company does not feel it necessary to its case to put those applications in [1001] evidence. However, they are available, if the plaintiff desires to put them in evidence.

The Court: Yes. Now, I am going to take a short recess.

Mr. Shryock: Yes, sir.

The Court: Are you going to have any rebuttal?

Mr. Shryock: May I answer that question, your Honor, when we return from the recess?

The Court: Yes, sir. That is why I said I would take one.

(A short recess.)

The Court: All right.

Mr. Shryock: If the court please, the plaintiff does not wish to offer any further evidence.

The Court: All right.

Mr. Dennis: If the court please, I would at this time make a motion to strike Plaintiff's Exhibit 3, which consists of 15 subdivision numbers, which is the climatic data. At the time that it was introduced, I made an objection, and at that time I think it was anticipated that the plaintiff was going to use it and have some of the witnesses refer to it. There has been no reference to that. It does contain a great deal of printed matter which has no bearing and no relevancy in this case, and I don't know what the purpose was in having introduced that particular exhibit.

Mr. Shryock: May I answer that, sir? [1002]

The Court: Yes.

Mr. Shryock: I think that the court made it clear that if the bulk of the exhibit or the cost of it on appeal was too great, that there was a way by which it could be physically taken up to San Francisco. We have had testimony as to the nature of the rainfall and the nature of the area, and I refer particularly to statements, for instance, of Mr. Hall as to the rainfall shadow of Palomar Mountain. We think the exhibit is revelant. What Mr. Dennis objected to was that certain pages were not extracted, as we did in Exhibit 14 and which we would have been glad to do had he said something about it 21 months ago.

Mr. Dennis: We did, but the Commander was not there at the time.

The Court: I think the exhibit will remain. If there are any legends which merely express opinions and do not state facts, they may be disregarded.

As you know, gentlemen, this is a suit in equity, and ever since the beginning of equity, the rules of evidence did not apply with great strictness, because the chancellor, being the keeper of the king's conscience, and being to start with a clergyman, he only later became a lawyer, was supposed to disregard anything that was not relevant.

I remember the first three-judge case, in which I sat with Judge Wilbur, who was also Secretary of the Navy once, [1003] and which involved, as do most three-judge cases, injunctive process against state legislation. We had to hear testimony, and somebody raised the point that certain matters were not relevant, and Judge Wilbur said, "We will receive it. We know what to disregard."

At the present time the trend is to apply that rule in all cases. In fact, there is a statement by the late Judge Garrecht of the Ninth Circuit in one of the cases that when a case is tried without a jury you can rely upon the assumption that the judge will not consider anything that is irrelevant, even though it may have gone into the record. And I think that is a very wholesome attitude toward the process of proof in our courts.

So, if there are any legends on any of these exhibits which on close examination should prove to be matters of opinion rather than statements of

fact, I will disregard them, whether you call them to my attention or not.

Now, gentlemen, I have a plan, which I want to discuss with you, in regard to the argument. As you know, I am a great believer in oral argument. Even if after oral argument I ask for additional briefs, I want oral argument anyway.

I think at this stage particularly oral argument will be very helpful, because I think you will agree with me that the most fundamental legal principles have been decided in the opinion rendered, right or wrong, and the question now [1004] is more of a question of the application of the particular principles that are declared to the facts in the case.

It occurred to me that you ought to have time, and I should have a little time, to go over in greater detail some of the exhibits which have been introduced, and with which I have familiarized myself only in rather a hasty manner.

You have a complete transcript, and I have a copy of the transcript. But I never look at it. I never look at the transcript until after the argument is over, when I want to formulate my ideas, in order to find some specific data. And many a time in writing an opinion I have relied on my own memory, and only then gone to the transcript to see if my recollection was correct.

My thought is this: that we adjourn until Tuesday of next week, and that at that time we have oral argument. If in conjunction with your oral argument you desire to present to me a sort of outline of your argument and any additional cita-



tions you desire to refer to, you may do so. Mr. Dennis has said he desires to argue a point which, so far as I remember, was not argued before, or, at least, I did not cover it, as to the relation of tributaries. Didn't you say you wanted to argue the relation of tributaries?

Mr. Dennis: That is correct, your Honor.

The Court: Now, those can be presented in that form. Many a time counsel came with a sort of brief of the argument [1005] as they call it, and then start from there, and then the court has the benefit of the summary. Then we have the cases there, and you do not have to stop and read them all, but you can read one and quote from it, and then refer to the others in the memorandum. That is a method that I have followed many a time in cases of this character.

Now, if that is satisfactory, then you will have the entire week end, including Monday, in which to marshal your facts, and if you desire to present a memorandum in connection with the argument, that will be all right. Then, if it should develop that some additional briefs are desirable, I will so inform you at the time.

What say you, gentlemen?

Mr. Shryock: I certainly will attempt to comply with what your Honor has suggested.

Mr. Dennis: I think that is an excellent way, your Honor. There is just this thought. Do you think we might argue the facts first, and have your Honor give us your conclusions as to the facts, and then argue the law afterwards?

The Court: That would be splitting it up.

Mr. Dennis: It makes it somewhat difficult perhaps sometimes to know as to how far we should go in our legal argument.

The Court: It is very difficult to determine a case of this character at the conclusion in any particular time. [1006]

Ordinarily, in the course of an argument, I generally indicate my reaction to certain things in a case. That ordinarily, of course can be done. At times, when you are not prepared, you have a situation where I get a certain impression of a case. For example, last Monday in a bankruptcy matter I was very emphatic when I said I didn't have much sympathy for a farmer who had been operating under the Frazier-Lemke Act for a long time, and should now be barred. I was very emphatic in my thought, but on studying the cases I found it did not make a bit of difference, that he was entitled to the benefit of the section which says that he is entitled to an appraisal and re-appraisal before it could be sold in bankruptcy, and so I am now writing an opinion talking myself out of that hasty statement that I made. I told counsel, frankly, that because I had been away, out of the district, I had not been able to study the memoranda, as I usually do, in advance of argument.

So I do not think we can split this, Mr. Dennis, in that manner. You can argue both. You can argue on a supposition.

I think the argument in this case will be rather narrow, because, in the first place, we have to

make a finding as to what the riparian rights of the Government are, the use to which the water is being put, the amount of water which is being used now, and the amount of water which, under the Code, [1007] the constitutional amendment of 1928, they might be entitled to if put to the fullest use. That is the fundamental issue.

Now, incident to that are such questions as you have raised, as to whether water is being taken out of the watershed. Then that is tied to the problem as to whether it has been used historically before you filed, so as to create a prescriptive right to a non-authorized use.

Then we come back to the proposition as to what is the flow of the river, and what is available, and is there a surplus which is subject to appropriation. In your case the facts are not complicated by any diversion, because you have made no diversion. So, to my mind, that is all there is to argue.

There may be incidental questions, such as what has been called the historic use of water, and what rights have accrued by reason of that, and you had something about questioning the right of the Vails and Santa Margarita agreeing by contract how to divide the water. [1008]

The question to my mind as I view it now is an abstract question because the testimony in the record is that they would be entitled—strike that. That by this contract they have reduced the amount of water which they could use.

Mr. Dennis: I think perhaps when I objected, your Honor, in the first instance I was wrong.

It is still my position that any party who is not a party to that judgment and privy to it is not bound by it. On the other hand the judgment is in evidence. It is an existing judgment. It is an existing agreement and therefore I think it limits the Vails' prospective rights of water.

The Court: Our code specifically says that a judgment is a contract. The Code of California has contained that provision ever since the code was adopted, so regardless of its effect as a judgment it certainly is an agreement limiting the rights between themselves and if as my impression is they actually by this stipulated judgment are taking more water than they would be entitled to then its effect on the others becomes unimportant because if it didn't exist you wouldn't be entitled to what one riparian owner has surrendered to the other. It doesn't affect the surplus as far as you are concerned.

Mr. Dennis: Only indirectly, your Honor, in this, that in figuring what their prospective uses might be it limits the future prospective of water on that ranch. [1009]

The Court: Yes, it might.

Mr. Dennis: At least the judgment being a binding agreement, being in full force and effect, so long as it is in full force and effect the Vails' rights are limited by that judgment and therefore their prospective rights would be limited by that.

The Court: That is right, I agree with you on that. But you see we have not gone into that. You are talking of possibilities. We have talked merely



about the possibility of further development for agricultural purposes in order to find the maximum allowance and to see if the substituted use can take it. That is what we are confronted with in this lawsuit.

Mr. Dennis: I assume that a lawsuit of this character and the numerous issues that we have that we won't be limited in our argument to any particular length of time.

The Court: No. You see, gentlemen, you have surprised me. I knew you would. I have always said this lawsuit is going to be a friendly lawsuit. I turned it into a friendly lawsuit myself—so far anyway.

Mr. Dennis: So far as the present defendants are concerned.

The Court: And secondly I felt that the pretrial work and the opinion which I wrote at your request, gentlemen, has settled in advance most of the questions of law. I cleared [1010] my calendar for the entire month with the exception of such matters as I have to take up on Mondays because I do not want other judges to do my work and besides it is more convenient for you.

You can go home over the weekends and be with your families and stay there rather than come back on Mondays.

But, I will give you all the time you want. If you want to reserve two days or a number of hours you may do so.

I want to say this, argument is very tiring both on the judge and on the reporter. About four hours

of solid argument is about all you can put in safely in a day.

Now, I am willing to allow four hours for each side and then spread it over two days, Tuesday and Wednesday.

Mr. Dennis: I think it might be necessary to take longer than that, your Honor, to develop all of the issues that are here.

The Court: How many hours do you want?

Mr. Dennis: I don't know until I hear what plaintiff has to say. I am still in the dark as to his theories.

The Court: I have listened to argument for many days. I know one case we listened to argument for seven days, but that involved \$100,000,000 in the Naval Reserve in the Elk Hills litigation. There was very little testimony in that case and all I had was a record of administrative hearings. We had five days of argument there. There was Judge Preston, [1011] Mrs. Adams, who is now Judge Adams, Mr. Prince of San Francisco, Mr. Donald Richberg and several other persons. That hearing was in Fresno.

I merely want to get an idea of how much time you want. I will give you five hours to each side. We can put in five hours all right.

Mr. Dennis: I am not in a position, of course, to estimate my time until I know what points are going to be advanced by counsel for plaintiff.

Mr. Shryock: You are back again, Mr. Dennis, to where you want us to tell everything that is going to be done ahead of time.

Mr. Dennis: I still don't know whether you claimed by virtue of riparian rights that you have a right to the use of water outside the watershed, for instance.

Mr. Shryock: I see. I think the record will show what we claim. I can only say this, your Honor, that I think four hours to a side is a most generous allowance.

The Court: Well, I will tell you what we will do. I will allow two days and we will try to divide those two days into five hours each and then if you find it cannot be concluded we will go over to Thursday.

I am not trying to limit you. I merely have found if you have unlimited argument you get into difficulties. I would rather give you more time than you may want and not use than not give you enough time. [1012]

I have no desire to curtail you. I am not going to clock you.

Mr. Shryock: I think Mr. Dennis might find that he might be even able to use some of my five hours.

The only thing that I have any reservation about is the fact he changes so frequently. Now, for example, this hated stipulated judgment which he now clings to with such deep affection. That is a complete change. And of course I may have to be prepared to meet those changes.

The Court: I know Mr. Dennis better than you do and I know very well that he is not dogmatic

enough to stick to an idea if he feels that his client is not going to be benefited by dogmatism.

Mr. Shryock: That is true. I think we can make out very well on the schedule that the court outlined.

The Court: All right, let it stand to be an average of five hours to the side.

Mr. Dennis: Thank you.

The Court: And we will begin Tuesday morning at 10:00 o'clock.

Mr. Grover: Your Honor, I think I may not have been as precise as I might have been yesterday about the State's cause. It is understood that the case is open so far as our proprietary rights are concerned. We have every expectation of settling that amicably. [1013]

Mr. Shryock: He is speaking of the teaspoon users capacity and that is understood.

The Court: That experimental station you were talking about?

Mr. Grover: Well, there are some fire control stations and school lands and there is a problem of the tax deeds and the escheated lands which we may have to work out and those change daily because of redemptions.

The Court: All right, if there are any issues relating to the proprietary interests of the state, as to the ownership of the land, and they are not settled by stipulation we will keep it open for future determination.

Mr. Grover: Thank you, your Honor.

Mr. Dennis: If your Honor please, just one



other thing. You remember sometime back you extended the time for the defendants who have not appeared, to January 1st.

The Court: Yes.

Mr. Dennis: We are rapidly approaching that point. I have had enough problems in connection with this particular phase of the litigation so that I have done nothing and I know a lot of people would appreciate it if their time is again extended for another 90 days.

The Court: All right, I have no objection to that. What was the late date?

Mr. Dennis: Either December 31st or January 1st. I have [1014] forgotten the form. It is as to the defendants who have not answered.

Mr. Dennis: The defendants who have not appeared will not be required to appear until a certain date and I think your Honor added that no defaults would be taken.

The Court: That is right. All right, we will make it March 31st.

Mr. Dennis: Thank you, your Honor.

The Court: Then the order will be that the time to answer for any defendants who have not appeared is extended to March 31st and no defaults will be taken on anyone prior to that date.

Mr. Shryock: Thank you, sir.

The Court: All right, gentlemen, then we will see you Tuesday.

(Whereupon, at 11:50 a.m. a recess was had until 10:00 o'clock a.m. Tuesday, November 25, 1952.) [1015]

Tuesday, November 25, 1952, 10:00 a.m.

The Court: Are there any ex parte matters? Cause on trial.

Mr. Dennis: If your Honor please, I have two things to take up before the argument. One is that on page 878 of the transcript I stated: "I also have a copy of the Navy's application to appropriate waters of the Santa Margarita River which was filed with the Division of Water Resources, the State Engineer of the State of California, which was prepared by the Attorney General's office in co-operation with the Division of Water Resources, and copies of letters," and then three letters amending the application that I offered to the clerk which is in evidence as Exhibit K—is the amended application rather than the original application and I would like at this time with the plaintiff's consent, to substitute the original application, which was the document which I thought I handed to the clerk.

Mr. Shryock: No objection.

The Court: The corrected document will be substituted.

Mr. Dennis: The other matter is this. Since we recessed I had an opportunity to secure a copy of the petition or supplemental petition for writ of mandate which was filed with [1018] the Ninth Circuit Court and I had an opportunity to read some of their authorities and I have discussed the matter with counsel for plaintiff and I believe it would be well, in view of some of the cases which were cited by counsel for the petitioners, if the record should have some evidence that Mr. Agnew is representing

the United States as special assistant to the Attorney General. I believe he has some documentary evidence——

The Court: That was taken care of by a regular substitution.

Mr. Dennis: I don't believe there is anything in the record except an oral statement, your Honor.

Mr. Shryock: That is correct, and apparently the court is willing to accept Mr. Agnew's statement that he had been designated as a special assistant to the Attorney General.

At the time he made that statement he was in possession of an original letter signed by the Attorney General of the United States designating him as a special assistant.

The Court: Gentlemen, I can settle the matter by stating that those copies were attached to the response which I filed in the Court of Appeals. They came with the response and a printed copy has the designation and I will read it into the record.

Mr. Dennis: I wasn't familiar with the response. I haven't seen any of the documents except the supplemental [1019] petition.

The Court: I may say this, gentlemen, they sent me two copies, one for my file but I returned one to Mr. McNearny. [1020]

I attached to it also an affidavit of mailing.

I will read into the record, gentlemen, Exhibits B, C, and D, and this will give me an opportunity to make some observations I want to make before you begin the argument.

Exhibit B, which is attached to the response made by me to the order to show cause issued by the Court of Appeals for the Ninth Circuit, No. 13599, is a copy of a letter addressed by the Attorney General of the United States to the Secretary of the Navy. It is dated August 11, 1952:

“Honorable Dan A. Kimball,

Secretary of the Navy, Washington 25, D.C.

Mr. Dear Mr. Secretary: This will refer to the case entitled “United States of America vs. Fallbrook Public Utility District, et al., in the United States District Court for the Southern District of California, Southern Division. The Congress of the United States in the Department of Justice Appropriation Act, 1953, approved July 10, 1952, 66 Stat. 556, section 208 (d), prohibited the expenditure of funds of this Department in the preparation or prosecution of the subject case. In the absence of funds this Department could not, of course, continue to prepare for or proceed to trial.

“This Department has been advised that due to the great importance of the litigation it is the desire of the Navy Department and the Marine Corps [1021] that the case should proceed. In recognition of that urgent necessity this Department is willing that the case go forward but in order to comply with the will of the Congress, the Department of the Navy must bear all of the costs in connection with the preparation and prosecution of the case. The Department will be glad to qualify your attorneys as Special Assistants to the Attorney General



without compensation other than that received from the Navy Department.

Sincerely,

“/s/ JAMES P. McGRANERY,  
Attorney General.”

Exhibit C is a letter dated September 9, 1952, from Ross Malone, Jr., Deputy Attorney General, to Mr. David Agnew. It reads:

“Mr. David W. Agnew,

Department of the Navy, Washington, D. C.

“Dear Sir: Simultaneously with the delivery of this letter there is being delivered to you your appointment as a Special Assistant to the Attorney General, authorizing you to act in that capacity in the handling of the case in the United States District Court for the Southern District of California, [1022] entitled ‘United States of America vs. Fallbrook Public Utilities District et al.’ It is specified in your appointment that you are to serve without compensation other than such compensation as you may receive as an attorney for the Navy Department.

“Your attention is invited to the restrictions included in Section 208 (d), Title II, Public Law 495, 82d Congress, 2d Session, approved July 10, 1952, which prohibits the expenditure of funds of the Department of Justice in the preparation or prosecution of this case. You are, therefore, specifically advised that under no circumstances are you authorized to incur any obligation or expense insofar as the Department of Justice is concerned in

connection with the performance of your duties under this appointment.

“Very truly yours,

ROSS L. MALONE, JR.,  
Deputy Attorney General.”

Exhibit D is dated September 9, 1952, and it reads:

“Mr. David W. Agnew,  
Navy Department, Washington, D. C.

“Dear Mr. Agnew: You are hereby appointed as a Special Assistant to the Attorney General in [1023] connection with the case entitled ‘United States of America vs. Fallbrook Public Utility District, et al., in the U. S. District Court for the Southern District of California.

“You are to serve without compensation other than that received as an attorney of the Navy Department.

“You should execute the required oath of office.

“Respectfully,

/s/ JAMES P. McGRANERY,  
Attorney General.

“By the Attorney General: “(Signed) Ross L. Malone, Jr., Deputy Attorney General.”

I presume Mr. Agnew took the proper oath and qualified?

Mr. Agnew: Yes, sir.

The Court: Now, gentlemen, I had no notice of these additional proceedings until I read the Times, the Los Angeles Times, of Friday, in which the United Press carried a story, giving a summary of

the response which I had made, and in that story there appeared this paragraph, which I shall read:

“At the same time, the Ninth Court of Appeals refused to file Fallbrook’s supplemental petition asking that besides the court, Justice Department [1024] and Navy officials be ordered to show cause why the trial, now proceeding against the Santa Margarita Mutual Water Co. and the State of California, as an intervenor, should not be stopped.”

It is quite evident that they discovered too late that they could not do anything except as to the particular party which sought the writ. Even now they have not made the Santa Margarita Mutual Water Company or the State of California parties to the action, either by making them respondents or even by giving them notice, so I am not afraid, gentlemen, of anything we have done. But I do not want to have wasted the time of the Santa Margarita Mutual Water Company and the time of the State of California and my judicial time. So in this case there will be no briefs filed. In other words, I am going to see to it that Mr. Agnew and Mr. Shryock, if some new writ is sought, will not be working on the case, that I will be the only one working on the case, so there will be nothing to stop me from deciding it, and I may decide it after the arguments are concluded. Frankly, I am certain they are going to try all sorts of things, because, despite all protests to the contrary, I am certain Mr. Swing’s client is determined not to have this cause tried, not only as to him, but as to anybody else. But he will have to have a better writ than

he had last time to undo the work that we have done. [1025]

So, gentlemen, we will proceed with the argument.

There is a matter which has arisen which may require me to change our hours. I should never make promises over the long-distance telephone, but when you are away from your own court you are not in a position, when somebody calls you on the long-distance telephone, to act. I was asked by the Secretary of the Treasury to induct into office tomorrow morning certain new officials, whose names have not been announced yet, who are to be appointed under this new reorganization of the Internal Revenue Department. I thought when I made the promise to do it that the proceedings would be held in this court house or, at least, in the State Building, so that our work would not be interrupted for more than a few minutes. However, I find that, because of the large number of people who have been invited, they are going to hold it at U. S. C. in Hancock Hall, which will require my going out there and coming back. That will cut our session in the morning. However, we will convene tomorrow at 1:00 o'clock and then put in the rest of the day. I will determine today whether today's noon session should be cut also, depending on the status of the argument.

The holiday, Thanksgiving Day, will be here, and, if it is necessary to carry over the argument to the following day, it will be all right with me. But I am hoping that it will not be necessary, so that



there will be no break in the [1026] continuity of the matter.

I may say that over the week end I have examined the exhibits which the clerk placed in my library, and I have a better knowledge of some of the things in the writings than I had before. So I am ready to proceed with the argument at the present time.

Mr. Grover: Your Honor, I should like at this time to make a couple of corrections in the record. Commander Shryock has prepared a list, but his list did not quite cover it, and I thought we might do it now.

The Court: All right.

Mr. Grover: At page 1013 of volume 9, line 23, the word "over" appears in place of "open." The record reads, "the case is over," and it should read, "the case is open," and I believe that is what I said.

Mr. Shryock: I am sure you did.

\* \* \* \* \* [1027]

Monday, April 6, 1953, 10:00 a.m.

(Other cases called.)

The Clerk: No. 23 on the calendar, 1247 Southern Division, United States of America vs. Fallbrook Public Utility District, et al. Mr. Shryock is present, Mr. Dennis, and Mr. Grover.

The Court: Gentlemen, I have examined this motion, and no memorandum in opposition has reached my desk.

I think perhaps the nature of the case is such that I ought to make a statement, and then I will hear from the Santa Margarita Water Company

and the State, because the idea of allowing the defendant in this case the exception under 54(b) was prompted by a desire on my part—you may sit down, Commander Shryock. I will take a little time. I brought some books here, and I want to put some law in the record—was prompted by a desire on my part not to embarrass the Santa Margarita Mutual Water Company, which very graciously, along with the State, consented to have the case tried, and did not join the Fallbrook Public Utility District in endeavoring to prevent trial.

I did not want to embarrass them by a possible situation that might arise where they might have to appeal a case piecemeal, so I made the reference in the opinion, and I put in an order that the judgment to be entered shall have [2] the benefit of the provisions of 54(b), which is a new section which was added by what are known as the 1946 amendments. They really were adopted late in 1947, at the end of the session. That provides that if a judgment is upon multiple claims the court shall not direct the entry of a final judgment unless the court makes a determination that there is no just reason for delay and upon an express direction for the entry of judgment. Then the rule continues:

“In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.”

The Court of Appeals for the Ninth Circuit has had occasion to interpret this section in a very recent case, the case of *Wan vs. Black*, decided on May 3, 1950, with Judge Mathews writing the opinion. Judge Mathews is the man on that court who writes all procedural opinions, because he has made procedure a special hobby. So you will find that 90 per cent of the opinions relating to procedure are written by Judge Mathews. In fact, I have four here, and every one is written by him, one way back 10 years ago. [3]

In the *Wan vs. Black* case an opinion was filed, but no final judgment was entered. The notation in the book was entry of a partial summary judgment. This arose from the District of Hawaii, Judge McLaughlin. Judge Mathews held that there was no final judgment, and no certificate, and, therefore, the order was not an appealable order, in the absence of such certificate.

In this particular case counsel for the Santa Margarita Mutual Water Company filed an appeal and notice of appeal after the opinion and the order for findings were filed. Mr. Grover called on me with that notice of appeal, and called my attention to the appeal. I tried to show him that the appeal was premature, and that the opinion was not a judgment, and no judgment was entered. The order was of the type which I enter in complicated cases, directing judgment and designating certain specific findings. The object is to reduce the argument to a minimum, as to what I decided. Sometimes lawyers read an opinion and they will not agree as to the facts that

I have decided. So in the Richfield case, in the Standard Oil case, in the ordinary antitrust cases, and other cases of that character, I supplement the opinion by saying, "Formal judgment and order to follow." And in this case it said, "Judgment to follow based" upon so many findings.

Now, I am satisfied that appeal is premature. There [4] are other cases in addition to the case I just cited. That case says that there must be compliance with the provisions of Rule 79(a), which provides that the clerk shall keep a judgment book, in which such judgment must be entered, and that no judgment, no matter how designated, can be considered a judgment on which appeal lies unless it is entered and docketed as such.

Now, Judge Mathews says that in this particular opinion, and here are two more, including a later one in which I participated when I sat last year on the Court of Appeals. One of the new cases which arose under the new rule is *Wright vs. Gibson*, 128 Fed. 2d, 865. It is a Ninth Circuit case. I am not taking the trouble to cite any other cases, because when it comes to procedure we do not need any other cases when we have law of our own.

In *Wright vs. Gibson* the late Judge O'Connor filed a written opinion, granting a motion to dismiss a certain count in the complaint. The opinion concluded with these words, "The motion is granted." Then the clerk of the court made an entry stating that the motions had theretofore been argued and submitted, and that "The court now files its opinion; and, pursuant thereto, said mo-



tions are granted." An appeal was filed, and the court said the appeal was premature, that there was no judgment, and the clerk's docket did not contain any entry of a judgment or a dismissal.

That case was followed later on by *Uhl vs. Dalton*, 1945, 151 Fed. 2d, 502. Again Judge Mathews wrote the opinion. In that particular case the court granted a motion to dismiss, and the court filed an opinion. This was from Nevada, Judge Norcross. Here Judge Norcross had filed an opinion, and concluded it, but did not "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment," nor was any judgment entered. The court said:

"The opinion was not a judgment, nor did it direct the entry of a judgment. Instead, it declared that neither party was entitled to a judgment, and, immediately following that declaration, ended with these words 'It is so ordered.' Thus, instead of directing the entry of a judgment, the court, in effect, directed that no judgment be entered."

Then Judge Mathews goes on to say:

"That was not a notation of a judgment, within the meaning of Rule 58 of the Federal Rules of Civil Procedure, \* \* \* and hence did not constitute the entry of a judgment."

Last year I sat with them in a case which arose from San Diego, *Weldon vs. United States*, 196 Fed 2d, 874. [6]

There a man had brought an action to suppress evidence. At first we were inclined to take the view

that as the evidence which they wanted to have suppressed related to an action before the Commissioner, there was no action before us. Finally, we got around to Judge Mathews' specialty, and here again he said there was no judgment, because there was just a minute order denying the motion to suppress, and there was no entry in the judgment book.

Now, these are the cases that I had in mind when I took the view that the appeal from the order here is premature. I do not desire, of course, to place my conception of the law above that of counsel. Counsel are anxious that no possible procedural mishap occur in the case, and if they think they are protected by that notice of appeal, it is all right with me.

In passing upon the findings, I took the trouble to point that out. And, incidentally, I have just read proof on it, and I have added the citations to the little memorandum which I filed, and which will be published in Federal Supplement, along with the findings. I thought the memorandum was adequate, insofar as it referred to the various sections, but it was not adequate because it did not refer to these cases. I took it as a matter of course, and unless learned counsel can agree as to what is and is not a final judgment, I thought I had better put some higher [7] court authority back of my memorandum, which I did this morning. The proof has gone in to the West Publishing Company with those corrections.

I am making the statement for this very reason:

in view of the anxiety of counsel as to disavowing the intention, I cannot see at the present time any advantage to be gained. I am quite certain counsel are not going to accept my view now. The appeal is pending. It can be dismissed, of course, before it is docketed, and, frankly, I had the clerk communicate with counsel, and I thought at one time they might authorize dismissal. It still can be dismissed before it is docketed. I think there is a subdivision of Section 57 which says that on stipulation of the parties it may be dismissed. So there is no advantage to be gained.

I am merely saying that because at the present time, unless some good reason is given to me, I cannot see why this case should remain here and abide the conclusion of the litigation with the Fallbrook Public Utility District, which is set in the near future, but which may not be concluded for many months, if it ever gets started.

I have not received the mandate. Evidently they are waiting the 30 days, although this is a special proceeding, and the 30-day clause does not apply. The mandate may come down at any time, and I may spread it, and when I do, nothing can be done further until some order is secured from the [8] Supreme Court in Washington.

So I think I will hear from Mr. Dennis and Mr. Grover as to why, in view of their attitude towards this case, the certificate which the Government requests should not be filed at the present time, so that the Government would know that, so far as the phase of the litigation between it and Santa Mar-

garita is concerned, the matter might just as well be up for review in the higher court, because it is a partial adjudication and not dependent upon the adjudication of the rights between Santa Margarita and the Fallbrook Public Utility District.

Now, having made that full statement, I will hear from Mr. Dennis and Mr. Grover.

Mr. Shryock: If your Honor please, may I say one word before they begin?

The Court: Yes.

Mr. Shryock: There is a circumstance which has arisen, which I feel should be brought to the court's attention, and that is that after this motion was filed the Undersecretary of the Navy wrote a letter to the Chief of the Army Engineers and to the Department of the Interior, with copies to all of the defendants in this case, in which he indicated that he wanted, if possible, to have the various experts get together as to the yield of the Santa Margarita River, pending possible negotiations for the settlement of [9] any dispute with the Fallbrook Public Utility District.

Consequently, I am now here, your Honor, asking not only on behalf of the United States, but on behalf of the Fallbrook Public Utility District—and I talked to Mr. Swing on Saturday of last week, and he joins in this—that the trial, which is now set for April 28th, be set over until sometime in the early part of July of this year, at such date as may suit your Honor's convenience,—Tuesday, July 7th, or Tuesday, July 14th, or whatever other date might suit your Honor's convenience, and I



feel that has such a direct bearing on the motion that is before you that that should be brought to your attention at this time.

The Court: Gentlemen, I have no objection to continuing the case when all of the parties that are interested in it desire a continuance, but I do not see that the present motion could be affected by that.

Mr. Shryock: No, except it does seem to me, your Honor, that it would make it even more difficult, if the defendants have any objection to the finality of the judgment, to assert that objection in view of a continuance until July, because they certainly must docket one of their appeals at some time or another, and it does seem to me, with the going unsettled dispute against the Fallbrook Public Utility District, they having demonstrated their appetite for appeal, they certainly would find great [10] difficulty in objecting to it at this stage of the proceedings. So, as I say, we request that a minute order be entered continuing the case to such date as your Honor may find convenient.

The Court: What do you desire to do with this motion?

Mr. Shryock: As far as the motion is concerned, we ask the court to grant the motion.

The Court: All right. As I have already intimated, I was going to trail the case another week, but if you want a later date, all right. I would rather, however, put it down for the end of June sometime, because August is our vacation month——

Mr. Shryock: Yes, sir.

The Court: —and if we cut into it, it disorganizes the court, especially my work as a chief judge. I have to be back early in September because I have to select a new petit jury and a new grand jury, and this is the type of case which, once it is begun, it cannot be continued with safety.

Mr. Shryock: Yes, sir. I think they also had in mind the setting of it in July to obviate any fiscal year questions that might arise.

The Court: Oh, I see.

Mr. Shryock: And July 7th is a Tuesday.

The Court: The Court of Appeals, through Judge Denman, [11] did a very thorough job in analyzing that situation.

Mr. Shryock: Yes, sir.

The Court: I think this new Congressman from Santa Ana ought to have a copy of it, and perhaps he would modify some of the speeches which he has been delivering. That is Mr. Ott. I might as well name him. I know he joined with Mr. Swing in saying I ought to be disqualified. I did not know that Congressmen who were not litigants in the case could tell Federal judges what to do about a case. I thought when it came to the Declaration of Independence one of the grievances against King George was that he wanted to make judges subservient to his will. Evidently some Congressmen do not realize that it is as bad to make a judge subservient to the Congress. I think he even threatened to stop my salary, but he hasn't stopped it yet. I had to bring that in, because some of the statements in this case that are appearing in the newspapers and made

publicly are ridiculous if you actually followed the litigation itself.

Now, you want the case continued until July?

Mr. Shryock: Yes, your Honor please, as to the separate trial against the Fallbrook Public Utility District.

The Court: All right. When do you want to pick it up? The first Tuesday in July would be all right.

Mr. Shryock: That is the seventh. [12]

The Court: The seventh. You want it for that date?

Mr. Shryock: Yes, sir.

The Court: All right.

Mr. Shryock: One final word, that may help in clarification so far as the present motion is concerned. I feel that on the state of the record it is quite clear that the judgment entered against the State of California as the defendant in intervention is against the State in its sovereign capacity and as *parens patriae*, and I think the record is clear that the matter of proprietary interests in any land which the State may have in the watershed has been left open.

However, I should like to make it clear that the United States is willing to enter into any stipulation which will clarify that.

The Court: All right. I will hear from the other side. The setting for the twenty-eighth of April will be vacated, and the case of the United States vs. Fallbrook Public Utility District, and others, will be continued.

Mr. Shryock: Thank you, your Honor.

The Court: Mr. Dennis, how about the coffee cup

defendants? Isn't it time to make another order continuing the date to answer?

Mr. Dennis: I think it would be well to make another order to that effect, as to those who have been served or [13] may hereafter be served, say, until the first of August, in which to appear.

The Court: What was the last date fixed?

Mr. Dennis: It comes up before July.

Mr. Shryock: I think May 15th is the present date.

The Court: May what?

Mr. Shryock: May 15th.

The Court: And you want until August 1st?

Mr. Dennis: I believe August 1st.

The Court: All right. I have the prior order here. It is ordered that those of the defendants who have not appeared are granted until 5:00 p.m., August 1, 1953, in which to appear. That is exactly the previous order which I entered on March 3rd.

The Clerk: Was the trial continued to July 7th, your Honor?

The Court: Yes.

Mr. Grover: Your Honor, in opposition to the motion, first of all, we have no appetite for appeal, as Commander Shryock has expressed it.

As your Honor stated this morning, our purpose in taking this preliminary appeal was precautionary only. Frankly, I do not believe the order was appealable, but because of some of the technicalities in the case and some of the important developments in the case, we thought we could not [14] risk that.

As to the appealability of the judgment of Febru-



ary 24th, entered on the 25th, as it provides that under Rule 54(b) it is not final, we would not want to appeal from that. We like the situation as it is under that judgment, and we are contemplating appeal solely for precautionary reasons again. The 60 days have not expired, in which we may appeal, and it is possible that we will satisfy ourselves that it is not appealable, and hence we shall not appeal. There is certainly no election on our part, as represented in the points in support of the motion, and there is certainly no desire on our part, but we feel constrained to be as careful as we have been, to protect appellate jurisdiction.

On the merits of the argument itself, it seems to me that the essence of the State's position requires that we remain in at all steps of the case. We were invited to participate by the United States itself, in order to allay fears widely held throughout this part of the country that some untoward event, some usurpation of State rights or of property rights of individuals would take place, and our participation for that purpose is just as applicable as the trial as to the Fallbrook Public Utility District and the other 3,000 or so defendants, when it is time for them to be tried, as it is now. As a matter of fact, we are most [15] anxious to be present on behalf of those 3,000 defendants if they have not been ruled out of the case before then.

Secondly, it seems to us there was a preliminary understanding of everyone concerned, and initiated from the bench, that no damage would result from

the fact we didn't participate in the steps which were taken to obstruct the trial of the case.

It seems to me, under the developments that have now taken place, the Fallbrook Public Utility District alone will gain the advantage of the delay which the Fallbrook Public Utility District initiated. Settlement negotiations are now taking place in Washington, and this letter from the Undersecretary of the Navy is evidence of that, which will prove it is still in the case, and those who cooperated with your Honor and went ahead with the trial, if this motion is granted, will be injured by this action. More than that, the State has continued the investigation of the watershed of the Santa Margarita River, and the State engineers will participate in the trial as witnesses, and the new information which is available will benefit only those who are in that trial. We feel the State should be there to be benefited by that information.

I might add, too, that the State, as you will recall, made no direct case of its own at that time, and one of the reasons for that was that Mr. Dennis was the only representative [16] of any party at that time, and had his particular way in which he wanted to try his case, and although we had the interests of everyone concerned in mind, nevertheless, we believed there would be a later time when we could assist in representing those interests, and so we went along with Mr. Dennis' style of trial. And we would have tried the case differently, perhaps, if we had known that the people we are representing as parens

patriae would have been foreclosed, so far as our assistance is concerned, by that part of the trial.

The Court: I do not think that situation would be affected because it is understood that at all times you are in the court, there is no likelihood of my going out of this case. I will bank my judgment as a lawyer that I will stay in this case.

Mr. Grover: I understand that, your Honor.

The Court: I do not think any Court of Appeals will say that the observations which I made about the delays that were being sought is a disqualification of the judge trying the law suit. In other words, as I told Mr. Phil Swing, what M-G-M could not do to me, he could not do, either. And I stand by that. Only two litigants in my experience have tried to disqualify me, M-G-M and the Fallbrook Public Utility District. M-G-M was disposed of with one line, and if what I said during the course of [17] the trial about the delaying tactics here, which were so evident to everybody, is sufficient to disqualify me from trying the case, then I have to learn something more on the law of disqualification in the Federal Courts.

So I want to say that the likelihood of my continuing with the case, God willing, is very good. Of course, younger men than I am have been dying. But other than that, there is no chance of anybody scaring me out of the case, Congressman, or anyone else.

Mr. Grover: I will agree with that, but I am sure your Honor's mind is open to the evidence that is presented.

The Court: It is open as to anything I haven't decided yet. As to the legal questions I have decided, those are decided in that particular manner.

Mr. Grover: As to the legal questions, but there are factual questions on the watershed of the river, on which new evidence has been discovered since the trial.

The Court: Yes. I am just saying that, and you understand I have no particular feeling in the particular case. Of course, after you volunteer to take a case, it does not belong to you, and when they have everybody, including congressmen, beginning to meddle it is rather disconcerting. I have been a judge for 26 years, and nothing surprises me any more, and I get more surprises all the time.

So I am saying that in making any kind of a ruling as [18] to any of these things, I am handling it with the idea that I will remain in this case.

Mr. Grover: I appreciate that, your Honor, and we wish to have the benefit of your Honor's evaluation of the new evidence.

The Court: All right.

Mr. Grover: More than that, I can see no reason, no hurry on this, outside of the fact of this precautionary appellate procedure. And I may say, your Honor, it is very possible that before the 60 days run out, we will have satisfied ourselves, so far as everyone is concerned. Of course, I do have to consult with my superiors on this that your Honor is right, and we appreciate your Honor's assistance in research on the subject. We may satisfy everyone that your Honor is right and not take the appeal



that we are contemplating. But, certainly, because we are contemplating an appeal to protect appellate jurisdiction is no hardship——

The Court: However, here is the situation: All I would do under this motion is this: I do not have to correct the judgment. I will merely prepare a certificate saying that so far as the matters adjudicated in this particular portion of the case there is no reason for further delay.

Now, if you appeal notwithstanding that declaration, [19] you are not harmed, and if you do not appeal, you are not harmed. Certainly that will not foreclose you one way or another. You can still go on, because a declaration to that effect cannot harm either you or Mr. Dennis' client.

The section is worded very peculiarly. It says:

“When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.”

Mr. Grover: But that would force us to appeal then, your Honor. I mean the time would begin to

run then, and we would have to appeal within the 60 days. And notwithstanding that we have felt constrained to take this [20] precautionary appeal, we don't want to do that.

The Court: When do your 60 days expire?

Mr. Grover: The judgment was entered on the twenty-fifth of February. It would be up about the twenty-fifth of this month. I haven't computed the 60 days, but it would be about April 25th.

The Court: All right. Mr. Dennis, what do you have to say?

Mr. Dennis: I join with Mr. Grover in opposing the Government's motion.

The court will recall that both prior to the trial, and during the trial, the court stated from the bench that any judgment which might be entered in this matter, insofar as it affected the Santa Margarita Mutual Water Company or the State of California, would not be final and would not become final until such time as the case was tried against the Fallbrook Public Utility District, and that the judgment would contain adequate provisions to insure my clients that they would not have to appeal until the Fallbrook Public Utility District was required to appeal.

Not only that, but your Honor will recall that prior to the time that pretrial negotiations were entered into, and the two orders were made in regard to the pretrial proceedings, the court made a ruling that all of the [21] defendants were cross-complainants against all of the other defendants, and that it would not be necessary to file cross-complaints.

The Court: Judge Weinberger made that ruling.

Mr. Dennis: Judge Weinberger did, and your Honor affirmed it later.

The Court: That is right.

Mr. Dennis: I do not think that it is fair or equitable to place my clients in the position where they will have to take one appeal in regard to the Fallbrook Public Utility District, which is one of the other two large appropriators, and take one so far as the United States of America is concerned.

Also, I feel for the Santa Margarita Mutual Water Company at this time to take an appeal would result in an injustice and create additional and perhaps unnecessary expenses, especially in view of the fact that on the twenty-seventh of March, 1953, Charles C. Thomas, Undersecretary of the Navy, addressed a letter to the Santa Margarita Mutual Water Company, requesting that they appoint a representative to enter into negotiations with the Government, with the Bureau of Reclamation, and the United States Geological Survey, the Chief Engineers of the Army, and the Department of the Navy, in an effort to determine the safe yield of the stream and the size of the dam to be built on the stream. [22]

In that letter they appointed Lieutenant Colonel Elliott B. Robertson of the United States Marine Corps as the representative of the Navy to enter into negotiations with the Santa Margarita and some of the other defendants named in the case. And I think, in view of the court's express statement, both prior to the trial and during trial, that

the order or judgment made herein, so far as the claim of the Santa Margarita was concerned, would not be final, that the Government's motion should be denied.

Now, it is true we did appeal from the order of the court which was made, at the same time that the court handed down its opinion. I think prior to that time both counsel for the State and myself discussed the matter, and I think we are of the opinion that the order was not a final order, and that it was not appealable. However, certain other interests indicated to us that there might be some question as to its appealability, and we discussed the matter with a number of people who are very familiar with Federal pleadings, and so we felt we could not afford to gamble with our clients' interests. In other words, notice of appeal is jurisdictional, and if it happened to be an appealable order, and if there were certain things in the order which would foreclose us from an appeal upon the final judgment which would be entered, we felt constrained to protect our interests. [23]

Your Honor will recall that the United States originally made a motion before Judge Weinberger for a separate trial of the action as against the Fallbrook Public Utility District and the Santa Margarita Mutual Water Company, and that was opposed by both defendants on the ground that it was not a separate claim, but that, being a suit to quiet title, it was only one claim, and that the claim of the United States could not be determined without determining the claims of all other defendants



who might have any rights in and to the subject-matter of the property which they referred to in the complaint.

Judge Weinberger made an order ordering that there should be a separate trial, and consequently your Honor brought the State of California in as a defendant in the separate trial. We went to the Circuit Court on a writ of mandate, and the court denied it without opinion, so that unfortunately we do not know whether it was on the ground in their discretion to refuse to issue a writ of mandate, or whether it was on the ground they felt it was not a separate claim, or was a separate claim as to each.

However, we have not abandoned that position, and did not abandon it during the trial, and if we happen to be correct and if the court should hold, as one or two of the judges held, that it was indivisible, then the provisions of Rule 54(b) would not apply. That is the only reason [24] we took the appeal, or contemplated taking the appeal from the court's order. Therefore, we prefer not to have the judgment become final until such time as it is final as to the Fallbrook Public Utility District.

At the time we took the appeal we did, as your Honor knows, we presented to counsel a stipulation—counsel for plaintiff—a stipulation stating there would be no obligation to take any further proceedings, insofar as perfecting the appeal was concerned, with adequate provisions for an order, so based, with an order from this court and the Circuit Court, so that, in any event, we were protected.

The Court: I have ruled on that, haven't I?

Mr. Dennis: I don't believe the first one your Honor did. I think the first one, your Honor, was the one——

The Court: As to the docketing?

Mr. Dennis: Yes. Then we have to go to the Ninth Circuit.

In view of the fact that the United States is asking that we enter into negotiations in an effort to see if we can't settle the problems here, I think it would be a mistake to modify the judgment which has been heretofore entered, with the result that it would create an additional financial burden on the Santa Margarita Mutual Water Company, in the preparation of the record on appeal, and we respectfully request the court to deny the motion. [25]

The Court: All right. Commander Shryock.

Mr. Shryock: If the court please, I think Mr. Dennis is under a slight misapprehension as to the letter of the Undersecretary of the Navy. That letter was addressed to the Chief of Engineers of the United States Army.

It stated that similar letters were being sent to the Commissioner of the Bureau of Reclamation of the Department of the Interior, and to the Director of the U. S. Geological Survey of the Department of the Interior, and to those addressees it said it is requesting that "you designate a representative to confer with representatives of the other above-named agencies."

That is the letter to which Mr. Dennis is referring, and I can hardly believe that it can be inter-

preted that he was to appoint a representative of the Santa Margarita Mutual Water Company.

However, I am not suggesting for a moment that any talk of settlement with any defendant would not be appropriate. I am simply saying that it seems to me that for two years we have been attempting to get somebody to say we have some rights in the river, and, at last, the only forum that is appropriate for it has. But the finality of that has been delayed, and now in view of current developments, it may be delayed indefinitely, beyond any reasonable period, so we think that we are at least entitled to have [26] certain finality attached to the findings that have been made as to our rights against these particular defedants.

The Court: All right. Commander Shryock, you will prepare a certificate to the effect of no delay, and I will make this promise, that I will wait until the twenty-fourth of April, and counsel can notify me at that time whether they abandon the appeal.

I am trying to find the subdivision of Rule 73 that applies, but this is a rather unusual form. I have here the amendments, and the prior rule. It is very good when you are doing research, but when you want to do things in a hurry, you cannot find what you want. There is a section which says that before the docketing of the appeal, it can be dismissed, upon the stipulation of the parties, by the District Judge.

I raised the question the other day, when I was asked to dismiss an appeal, and an attorney called my attention to that, that the appeal had not been

docketed, and if it is premature, that it can be dismissed.

So you prepare an order, and I will hold it until April 24th. In that time counsel can communicate with me and tell me whether they want to dismiss the appeal, and file a new one.

Mr. Dennis: Do I understand, your Honor, that if we will not dismiss the appeal, you will sign it, and if we [27] dismiss it, then you will refuse to sign the order?

The Court: That is right. Then I will deny it, and I will clear the decks. When I look at procedure, I am like Judge Mathews, I look at procedural rights as being important, and they are some of the finest rights we have in English-speaking forums. If you study any book on the development of free speech, you will see how long it took to allow juries in criminal libel cases to judge facts on the law, and that was a departure. Free speech could not have been developed in the United States unless juries had been willing to stand up, as they have been urged to do by John Erskine, and others, because before that courts were sending people to jail in that connection.

The rule of procedure is very important, and I was the one who said the appeal was premature, but I don't want this appeal pending. If you stand by the form in which you originally had it, then, of course, a reasonable delay will not matter, and this motion can be renewed. Even if I deny it, it can be renewed if there is further delay in the matter.

Mr. Grover: Could we have the docketing time



extended until that date also, your Honor? It is now due to run out on the fifteenth.

The Court: Yes. We have plenty of time. We have 90 days.

Mr. Grover: I will prepare an order, then, extending [28] the time.

The Court: Yes, do that. You prepare an order, and have it approved as to form, and I will promise you not to sign it unless that contingency arises. If the other appeal is not dismissed, or a new appeal is filed, I am going to enter them.

Mr. Shryock: Then may I inquire, the effect of that will be that the non-finality of the judgment entered on February 25th will then remain?

The Court: But you can renew the motion at any time.

Mr. Shryock: Very well, sir.

The Court: The motion can be made at any time, as to the effect of it. You can renew the motion later if you are not getting anywhere with the negotiations.

Mr. Shryock: The net result, however, would be that even if we do get rid of these so-called precautionary appeals, the judgment would not be a final judgment.

The Court: It will be held up for a reasonable time. I have retained jurisdiction, and I put into the judgment a provision, and you can always use the power of the court to prevent an injustice being done, even to the Government. Of course, it is heretical doctrine these days to say that the Government has rights.

Mr. Shryock: Yes, sir, we are aware of that. I will prepare such an order, your Honor. [29]

The Court: You know, evidently the Court of Appeals has not read some of these fictionalized stories about Fallbrook, because Judge Denman, the Chief Judge, says that this is an action brought by the United States Government as a riparian owner to declare water rights which it acquired through purchase. They have not heard about any claims by a sovereign power. Evidently they have not read the speeches that are being delivered in New York.

Mr. Dennis: Your Honor, I had one other short matter.

The Court: Yes.

Mr. Dennis: Earlier in these proceedings the Government was represented by other counsel.

The Court: Just a minute. The record will show that the matters are under submission; you are to prepare the order, submit it to the clerk, and I will hold it, as I stated.

Mr. Dennis: Earlier in the proceedings the Government was represented by other counsel, and at that time he authorized me to contact various members representing the Secretary of the Navy's office on Camp Pendleton direct, without going through counsel. In view of recent developments, I would like to have the record show whether Commander Shryock would extend to me the same courtesy, so that I can contact them direct in regard to inquiries that I get both from Camp Pendleton and from Washington, D. C. [30]

Mr. Shryock: I can say I have no objection.

The Court: Mr. Agnew has an office there, and I know my secretary has contacted him.

Mr. Dennis: I have no difficulty in reaching him, but in other words, there are many matters that come up in regard to the interests of various clients, and things with which the Commander is not familiar directly.

The Court: You will remember Mr. Agnew was designated as an Assistant Attorney General.

Mr. Dennis: That is correct. But when Mr. Veeder was in the case I was privileged to have any dealings directly with the representatives at Camp Pendleton.

The Court: Well, Veeder was being the whipping boy in the case. I had to make him my own lawyer so as to have somebody appear for me in the Court of Appeals, and now they want to stop his travel allowances. I assume I will have to take up a collection to pay his fare in going to the Court of Appeals to represent me. In connection with that, I can say about the State of California, especially in Los Angeles County, that we have the County Counsel's office, and when I was on the Superior Court, and when that happened there, I just called Sam Pritchard and said, "Come on over. There is a writ against me." So then you did not have to be represented by the attorney for the opposite side. Of, course, there is no such provision in the Federal law, so [31] I had to ask the Attorney General, and if you will look at the record, you will find I asked Mr. McGranery to appear for me.

Mr. Dennis: I understand, your Honor, that Commander Shryock has no objection.

Mr. Shryock: That is correct. They will probably submit it to me, anyway.

The Court: I told you that before we get through here this is going to be a friendly law suit. I think it is developing into that.

Mr. Grover: Your Honor, in the record, or, rather, in Judge Denman's opinion he stated that the State of California had made a motion to transfer the case to Los Angeles. At that time Mr. Shaw was in the case, but I haven't any knowledge that that is so, although it is possible that he did make it without my knowledge.

The Court: All he said was this: When I first intimated that because of conditions down there I might have to move the case up here, and at that time I didn't even have the little hearing room which we now have, and it took me nine months to get it—I made the statement that because of lack of facilities I might have to transfer the case to Los Angeles, where I had a court room available, and then Mr. Shaw said, "I so move." Then Mr. Swing said that he objected to it. He said, "There is no provision [32] for a per diem for me while I am away from home." So we passed it up at the time, but that is what Judge Denman referred to.

Mr. Grover: I see, your Honor.

The Court: He merely said that the State had no objection. As a matter of fact, nothing was done then, and I denied another motion of Mr. Swing to continue it.



So I think Judge Denman's statement of the facts in the case is correct.

All right, gentlemen, I have you all in agreement, and I will keep the matter under submission until April 24th. The case is continued, and that order has already been made. [33]

[Endorsed]: Filed September 21, 1953.

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[Endorsed]: No. 14049. United States Court of Appeals for the Ninth Circuit. People of the State of California, Appellant, vs. United States of America, Appellee. Santa Margarita Mutual Water Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Southern Division.

Filed: September 22, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14049

PEOPLE OF THE STATE OF CALIFORNIA,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

SANTA MARGARITA MUTUAL WATER  
COMPANY, Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

### STIPULATION AND MOTION

Whereas several of the opinions and orders of the District Court issued in the above-entitled matter have been published in Federal Supplement;

And Whereas the publishers of Federal Supplement have indicated that reprints of said published opinions and orders will probably be available at a cost of approximately 50c each;

And Whereas said cost is much less than that of including said opinions and orders in the printed record on appeal;

And Whereas all parties to the appeal desire to keep the cost of the appeal at a minimum;

And Whereas it is believed that the use of the aforementioned reprints from Federal Supplement

will adequately serve the needs of both Court and counsel in the course of the appeal——

Now Therefore the Parties to This Appeal Hereby Stipulate that, in the consideration and decision of the appeal, Federal Supplement reprints of the following documents, if available in sufficient quantity, may be used by the Court in place of including said documents in the printed record on appeal, and that said documents need not be printed:

1. Order on pretrial hearing. 109 Fed. Supp. 43. Item 16 of Designation of Record on Appeal.

2. Pretrial order. 109 Fed. Supp. 44. Item 17 of Designation of Record on Appeal.

3. Opinion of December 9, 1952. 109 Fed. Supp. 28. Item 20 of Designation of Record on Appeal.

4. Order of December 9, 1952. 109 Fed. Supp. 42. Item 21 of Designation of Record on Appeal.

5. Findings, conclusions, and judgment. 110 Fed. Supp. 770. Item 22 of Designation of Record on Appeal.

6. Order concerning findings and judgment, dated February 24, 1953. 110 Fed. Supp. 769. Item 23 of Designation of Record on Appeal.

And the Said Parties Hereby Respectfully Move that the court enter an order allowing the use of said Federal Supplement reprints as aforesaid, such order to take effect only if appellants file ten copies of each reprint for the use of the Court.

/s/ By RAYMOND de S. SHRYOCK,

DAVID W. AGNEW,

Attorneys for Appellee, United  
States of America

EDMUND G. BROWN,  
Attorney General

/s/ By GEORGE G. GROVER,  
Deputy Attorney General

Attorneys for Appellant, People of the State of  
California

/s/ By W. B. DENNIS,  
Attorney for Appellant, Santa Margarita Mutual  
Water Company

So Ordered:

/s/ WILLIAM DENMAN,  
United States Circuit Judge

[Endorsed]: Filed Nov. 6, 1953. Paul P. O'Brien,  
Clerk.

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[Title of U. S. Court of Appeals and Cause.]

## STIPULATION AND MOTION

Whereas numerous exhibits were admitted into evidence in the trial of the above-entitled matter in the District Court and have been included in the designation of record on this appeal;

And Whereas several of said exhibits are exceptionally large and would be difficult and expensive to reproduce in printed form;

And Whereas all parties to the appeal desire to keep the cost of the appeal at a minimum;

And Whereas it is believed that the needs of the



Court in the course of the appeal can be adequately served by using all the original exhibits on file in place of including them in the printed record on appeal—

Now Therefore the Parties to This Appeal Hereby Stipulate that all the exhibits on file may be used by the Court in the consideration and decision of this appeal as fully as if included in the printed record on appeal, and that said exhibits need not be printed.

And the Said Parties Hereby Respectfully Move that the Court enter an order allowing the use of all the original exhibits as aforesaid in place of including them in the printed record on appeal.

/s/ By RAYMOND de S. SHRYOCK  
DAVID W. AGNEW,  
Attorneys for Appellee, United  
States of America

EDMUND G. BROWN,  
Attorney General

/s/ By GEORGE G. GROVER  
Deputy Attorney General  
Attorneys for Appellant, People of the State of  
California

/s/ By W. B. DENNIS,  
Attorney for Appellant, Santa Margarita Mutual  
Water Company

## ORDER ON REPRODUCTION OF EXHIBITS

On consideration of the stipulation of counsel that the original exhibits in above cause may be considered by the court in their original form,

It Is Ordered that counsel for respective parties may furnish four typed copies of exhibits or pertinent portions of exhibits relied on, or in the alternative may print such exhibits or portions of the exhibits as an appendix to their respective briefs.

/s/ WILLIAM DENMAN,

Chief Judge

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

Judges of U. S. Court of Appeals

[Endorsed]: Filed Nov. 6, 1953. Paul P. O'Brien,  
Clerk.

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[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD  
TO BE PRINTED

In connection with the above appeals, People of the State of California, Appellant, and Santa Margarita Mutual Water Company, Appellant, herewith present their joint designation of the portion of the record to be printed:

1. Complaint, including Exhibit A thereto.
2. Motion of defendant Santa Margarita Mutual Water Company to dismiss, to strike, and for an order directing plaintiff to file a more definite statement.

3. Order denying motion of defendant Santa Margarita Mutual Water Company to dismiss, to strike, and for an order directing plaintiff to file a more definite statement.

4. Answer of defendant Santa Margarita Mutual Water Company.

5. Motion of People of the State of California to intervene.

6. Order granting motion of People of the State of California to intervene.

7. Answer of People of the State of California, defendant in intervention.

8. Reply of plaintiff United States of America to answer of defendant Santa Margarita Mutual Water Company.

9. Motion of plaintiff for separate trial on the merits against defendant Santa Margarita Mutual Water Company.

10. Order for separate trials as to defendant Santa Margarita Mutual Water Company and defendant Fallbrook Public Utility District.

11. Reply of defendant Santa Margarita Mutual Water Company to plaintiff's motion for separate trial on the merits.

12. Order that People of the State of California, defendant in intervention, be a party to the separate trial as to defendant Santa Margarita Mutual Water Company and defendant Fallbrook Public Utility District (which is lines 4 through 16 of page 305 of the reporter's transcript of proceedings at San Diego, California, on Friday, July 11, 1952).

13. Notice and motion to amend answer of People of the State of California, defendant in intervention.

14. Order that the amendment to the answer of People of the State of California, defendant in intervention, be filed.

15. Amendment to the answer of People of the State of California, defendant in intervention.

16. Reporter's transcript of the proceedings at the trial which was held beginning October 29, 1952, and ending November 28, 1952, as follows:

From page 1, line 1, through page 192, line 21;

From page 199, line 9, through page 215, line 6;

From page 236, line 9, through page 321, line 5;

From page 346, line 19, through page 480, line 10;

From page 505, line 6, through page 751, line 15;

From page 785, line 16, through page 1027, line 16.

17. Portions of proposed amendments of State of California and Santa Margarita Mutual Water Company (lodged February 20, 1953) to proposed findings of fact, conclusions of law, and judgment (lodged by the United States on February 10, 1953) as follows:

Page 1, lines 23 through 28;

Page 2, line 27, through page 4, line 13;

Page 26, line 27, through page 27, line 13;

Page 42, lines 1 through 10;

Page 47, line 1, through page 48, line 8.

18. Notice of hearing to be held July 1, 1953, to determine whether judgment should be made final.

19. Certificate of July 1, 1953, making judgment final.



20. Reporter's transcript of proceedings on April 6, 1953.

21. Notices of appeal of People of the State of California and Santa Margarita Mutual Water Company, filed on July 24, 1953.

22. Order of August 10, 1953, extending time to docket appeals.

23. Statement of points on appeal, filed Aug. 24, 1953, (with notation that an identical statement was filed in the Court of Appeals on Oct. 1, 1953).

24. Stipulation and motion concerning use of Federal Supplement excerpts in lieu of printing of certain portions of the record on appeal (mailed to Court of Appeals November 4, 1953).

25. Stipulation and motion concerning use of exhibits in their original form on appeal (mailed to Court of Appeals November 4, 1953).

26. This designation of the portions of the record to be printed.

EDMUND G. BROWN,

Attorney General

/s/ By GEORGE G. GROVER,

Deputy Attorney General

Attorneys for People of the State of California,  
Appellant

/s/ W. B. DENNIS,

Attorney for Santa Margarita Mutual Water Com-  
pany, Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 13, 1953. Paul P. O'Brien,  
Clerk.

